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IN THE

# SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,

*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

*Appellees.*

(continued on inside front cover)

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

## JURISDICTIONAL STATEMENT

SLADE GORTON,
*Attorney General,*
*State of Washington*
RICHARD H. HOLMQUIST,
*Senior Assistant Attorney General*
MATTHEW J. COYLE,
*Assistant Attorney General*
*Attorneys for Appellants.*

Office and Post Office Address:
Temple of Justice
Olympia, Washington 98504
Telephone: (206) 753-5528

STATE PRINTING PLANT OLYMPIA, WASHINGTON

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STATE OF WASHINGTON,

*Appellant,*

v.

UNITED STATES OF AMERICA, et al.,

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## ERRATUM TO JURISDICTIONAL STATEMENT

In the Jurisdictional Statement heretofore filed by Appellants herein, the following line was inadvertently omitted and should be inserted between lines 9 and 10 of the first full paragraph at page 18:

"specifically authorized to do so by Congress. *Oliphant*"

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SLADE GORTON,
*Attorney General,*
*State of Washington*
RICHARD H. HOLMQUIST,
*Senior Assistant Attorney General*
MATTHEW J. COYLE,
*Assistant Attorney General*
*Attorneys for Appellants.*

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*Attorneys for Appellants.*

Office and Post Office Address:
Temple of Justice
Olympia, Washington 98504
Telephone: (206) 753-5528

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ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

## JURISDICTIONAL STATEMENT

This appeal involves several important questions relating to state taxing and police power as applied

on Indian reservations. The primary questions involve (1) the application and enforcement of Washington's cigarette and sales taxes to sales by reservation Indians to non-Indians, and (2) the application of Washington's vehicle excise taxes to vehicles owned by reservation Indians and driven *partly on and partly off* the reservation.

As such, this appeal involves many of the same questions answered by this Court in *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), as well as several questions specifically reserved in that case.

The fundamental basis for the State's appeal is that the majority opinion below, if allowed to stand, effectively emasculates *Moe;* it would leave the continued viability of *Moe* to the whim of each Indian Tribe. Furthermore, taken to its logical conclusion, this reasoning could lead to the total destruction of state taxing power over non-Indians residing or conducting business on Indian reservations.

Therefore, in order for this Court to perpetuate its decision in *Moe*, and in order to dispose fully of the substantial questions of state taxing power on Indian reservations, it is necessary that this Court note probable jurisdiction of this appeal and set it for full briefing and argument.

## OPINION BELOW

The opinion of the three-judge district court below is reported at 446 F.Supp. 1339. The judgment



comprises a consolidated decision,[1] filed February 22, 1978, and a declaratory judgment and decree of permanent restraint[2] filed May 10, 1978.

## JURISDICTION

The action in No. 3868 was commenced on May 17, 1973, by the filing of a complaint by the appellee Indian Tribes seeking declaratory and injunctive relief against the application and enforcement of the State of Washington's cigarette and tobacco products excise taxes as applied to the Tribe and its members on the grounds that the application and enforcement of these taxes were invalid and repugnant to Art. I, §8, cl. 2 of the United States Constitution, the Washington Enabling Act, 25 Stat. 676, §4, the Indian Traders Act, 25 U.S.C. §261, *et seq.* The Tribes also sought declaratory and injunctive relief against the application of general state civil and criminal jurisdiction over the Colville Tribe and partial state assumption of civil and criminal jurisdiction over the Makah and Lummi Tribes, all of which were assumed pursuant to RCW chapter 37.12, on the grounds that such assumption of jurisdiction violated Art. I, §8, cl. 2 of the United States Constitution (the Indian Commerce Clause), the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Washington Enabling Act, 25 Stat. 676, Wash. Const. Art. XXVI, §2, and Public Law 83-280 (18 U.S.C. §1162, 28 U.S.C. §1360).

[1] App. A. (Hereinafter references to the Appendix are to the separately printed Appendix filed with this Jurisdictional Statement.)
[2] App. B, C.

The action in Cause No. 3909 was commenced by the filing of a complaint on July 18, 1973, by the United States on behalf of the Confederated Tribes and Bands of the Yakima Indian Nation. The complaint sought declaratory and injunctive relief against the enforcement of state cigarette and tobacco products taxes on the Yakima Indian Reservation and the seizure of cigarettes and tobacco products in interstate commerce bound for the Yakima Indian Reservation on the grounds that such actions were repugnant to Art. I, §8, cl. 2 of the United States Constitution (the Commerce Clause) and the Fifth and Fourteenth Amendments to the United States Constitution. On April 25, 1974, the Yakima Indian Nation intervened on its own behalf.

Because the complaints sought injunctive relief against the enforcement of state statutes, a three-judge district court was convened pursuant to former 28 U.S.C. §§2281 and 2284. However, prior to the actual convening of the three-judge court, on November 5, 1973, the Honorable Charles L. Powell, United States District Judge for the Eastern District of Washington, issued a temporary restraining order enjoining the state from enforcing its cigarette and tobacco products taxes against the Tribes. On September 6, 1974, the full three-judge court issued a preliminary injunction enjoining the state from engaging in any action or acting in any manner to enforce its cigarette and tobacco products taxes against the tribes or their licensed retailers.



Nos. 3868 and 3909 were consolidated for purposes of trial. Subsequent to extensive discovery proceedings and briefing, the causes were tried upon stipulated facts as supplemented by deposition testimony and affidavits before the three-judge district court in Seattle, Washington, on March 28, 1977.

On February 22, 1978, the three-judge district court entered its consolidated decision.

On May 10, 1978, the three-judge district court entered the declaratory judgments and decrees of permanent restraint.

On May 19, 1978, the State filed a motion for partial new trial pursuant to FRCP 59(a).[3] This motion for a partial new trial was addressed to the issue of the State's ability to apply and enforce its cigarette and sales taxes on sales by the tribes to non-Indians.[4]

On July 10, 1978, the three-judge district court entered an order denying the State's motion for partial new trial.[5]

On July 12, 1978, the State filed a notice of appeal in Cause No. 3868 dealing with the motor vehicle excise tax issues and Public Law 83-280 assumption of jurisdiction issues decided adversely to the State by the three-judge court.[6]

On August 14, 1978, the State filed a notice of

[3]App. D.
[4]A petition for rehearing renders a district court's original judgment nonfinal for purposes of appeal for as long as the petition is pending. See, *United States v. Healy*, 376 U.S. 75 (1964); *United States v. Dieter*, 429 U.S. 6 (1976).
[5]App. E, F.
[6]App. G.

appeal in both Nos. 3868 and 3909 dealing with all the cigarette and sales tax issues decided adversely to the state by the three-judge court.[7]

On September 8, 1978, the State filed an amended notice of appeal in No. 3868 adding the motor vehicle and Public Law 83-280 issues decided adversely to the State to the cigarette and sales tax issues originally appealed on August 14, 1978.

Therefore, in accordance with Rule 13 of the Rules of the United States Supreme Court, appellants are required to file this jurisdictional statement within 60 days from the filing of the notice of appeal, i.e., on or before October 13, 1978.

Jurisdiction of the Supreme Court to review the judgment below by direct appeal is confirmed by 28 U.S.C. §1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73 (1960); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976).

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const., Art. I, §8, cl. 2 (Commerce Clause); U.S. Const., Fourteenth Amendment (Equal Protection Clause).[8]

Wash. Const., Art. XXVI, §2.[9]

[7]App. H, J.
[8]App. K.
[9]App. L.



Washington Enabling Act, 25 Stat. 676, §4.[10]

25 U.S. §§1321-1326 (Civil Rights Act of 1968).[11]

Public Law 83-280 (67 Stat. 588; 18 U.S.C. §1162, 28 U.S.C. §1360).[12]

Washington State statutes.[13] RCW 82.08.020, -.30(4), -.050 (sales tax); RCW 82.24.020, -.030, -.040, -.050, -.080, -.260 (cigarette excise tax); RCW 82.44.020, -.110 (motor vehicle excise tax); RCW 82.50.400, -.410, -.510, -.540 (camper and travel trailer excise tax).

Washington administrative regulations.[14] WAC 458-20-192 (excise tax liability of Indians); ETB 504.08.192 (tax reporting requirements).

Colville Tribal Taxing Ordinance.[15]

Lummi Tribal Taxing Ordinance.[16]

Makah Tribal Taxing Ordinance.[17]

Yakima Tribal Taxing Ordinance.[18]

## QUESTIONS PRESENTED

1. May a state impose upon an Indian tribe and/or its licensed Indian retailers the obligation to collect state excise taxes on sales of personal property on the reservation to non-Indian purchasers where the legal incidence of the tax falls upon the non-

[10]App. M.
[11]App. N.
[12]App. O.
[13]App. P.
[14]App. Q.
[15]App. R.
[16]App. S.
[17]App. T.
[18]App. U.

Indian, despite the fact that the tribe has adopted ordinances taxing these same transactions?

2. May a state impose upon an Indian tribe and/or its licensed Indian retailers the obligation to collect state excise taxes imposed on their sales of personal property to Indian purchasers other than members of the tribe occupying the reservation where the legal incidence of the tax falls upon the Indian, despite the fact that the tribe has adopted ordinances taxing these same transactions?

3. May a state impose upon an Indian tribe and/or its licensed Indian retailers making sales on the reservation to non-Indian purchasers, nondiscriminatory reporting and auditing requirements designed to insure that taxes collected on sales to non-Indians are properly accounted for?

4. Assuming the state has the authority to require Indian tribes and/or their licensed retailers to collect and remit taxes on their sales to non-Indians, may the state enforce collection of such taxes by confiscating as contraband cigarettes or other personal property within the state which are being shipped in interstate commerce to the Indian tribe for ultimate resale to non-members of the tribe?

5. May a state lawfully seize and levy upon property of Indian tribes to enforce tax collection responsibility for state taxes imposed against non-Indian purchasers?

6. May a state impose an excise tax on the privilege of using a motor vehicle with respect to



motor vehicles, travel trailers and campers owned by an Indian tribe or its enrolled members residing upon the reservation, where the motor vehicles are used *partly on and partly off* the reservation?

7. Does the State of Washington's assumption of partial territorial jurisdiction over Indian reservations pursuant to RCW 37.12.010 violate the Equal Protection Clause of the United States Constitution?[19]

## STATEMENT OF THE CASE

The facts essential to a resolution of this appeal are not in serious dispute, and are fully set out in the opinion of the Court below.[20] Briefly summarized, the relevant facts are as follows.

A. **The Tribes and Reservations.** Appellee Indian tribes are duly recognized Indian tribes with a governing body recognized by the Secretary of Interior. With the exception of the Makah Tribe, none of the tribes are organized under the Indian Reorganization Act of 1934, 25 U.S.C. §476, *et seq.* Each of the tribes occupies a reservation entirely within the geographical limits of the State of Washington. The Lummi and Makah tribes are located in Western Washington on reservations established by treaties in 1855. The Colville Indian Reservation is located in Eastern

[19]This is exactly the same question presented to this court for resolution in the case of *State of Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, prob. juris. noted,* 46 U.S.L.W. 3541 (U.S. Feb. 27, 1978) (No. 77-388). Oral argument was held in this latter case on October 2, 1978. Therefore, although this issue is presented in this appeal, it will be controlled by the Court's decision in No. 77-388. Accordingly, no further mention of this issue will be made in this Jurisdictional Statement.

[20]The facts were established by stipulation of the parties, as supplemented by deposition testimony and uncontroverted affidavits.

Washington and was established by executive order in 1872. The Yakima Indian Reservation is also located in Eastern Washington and was established by treaty ratified in 1859.

The Lummi, Makah and Colville reservations are somewhat isolated and underdeveloped. Most essential goods and services are located off the reservation. Most Indian households on these three reservations own at least one automobile, and the three tribes own numerous motor vehicles. Many of these motor vehicles are operated both on and off the reservation.

The Yakima Reservation is less isolated and less underdeveloped than the Lummi, Makah, and Colville Reservations. The reservation population is approximately 27,000, about 6,500 of whom are Indians including 1,500 non-members of the tribe. All of the tribes suffer unemployment rates substantially above the state-wide average. The Colville and Makah tribes at the time of this litigation experienced unemployment rates of 33 and 60 percent, respectively. All of the tribes are desirous of developing their reservations to stimulate employment. In addition, the tribes run numerous programs designed to improve the economic well-being, health, education and social welfare of the tribes' members. These programs are financed in part by tribal tax revenues, chiefly tribally imposed taxes on the sale of cigarettes.

B. **Tribal Taxing Schemes.**

1. Colville, Lummi and Makah Tribes. The Tribes have adopted ordinances, approved by the



Secretary of Interior, adopting what the District Court termed a "* * * comprehensive scheme for the licensing, regulation and taxation of the sale of cigarettes on the reservations."[21] Pursuant to these ordinances, the Tribes are essentially engaged in the retailing of cigarettes at tobacco outlets established on the reservation. Cigarettes are purchased from out-of-state wholesalers with federally restricted tribal funds and are shipped directly to the Tribes in interstate commerce. The Tribes then distribute cigarettes to their tribally licensed dealers for ultimate sale to consumers. The dealer at each tribal tobacco outlet is a federally licensed Indian trader. The cigarettes, under the terms of the ordinances, remain the property of the Tribe until sold to ultimate consumers.

Each Tribe levies a cigarette tax upon the distribution of cigarettes on the reservation. Apparently, the taxable event is the distribution of cigarettes from the Tribe to its licensed dealers. See, e.g., Colville Tribal Ordinance, §8, App. R. The Tribes' tax, which ranges between 40 to 50 cents per carton of cigarettes is required to be added to the retail price of the cigarettes.

2. Yakima Tribe. The Yakima Tribe has also adopted an ordinance regulating and taxing the sale of cigarettes. This scheme is slightly different from the scheme employed by the Colville, Lummi and Makah Tribes. Pursuant to its ordinances, the Yak-

[21] Consolidated decision, App. A, p. 8.

ima Tribe purchases cigarettes from wholesalers outside the state which it then wholesales to tribal members who have been licensed to run "smoke shops" on the reservation. The Tribe derives a profit of 1 cent per carton on each carton sold to its dealers. In addition, the Tribe imposes a tax of 22.5 cents per carton sold by the dealers.

C. **State Cigarette and Sales Taxing Scheme.** The State of Washington imposes a cigarette excise tax in the amount of $1.60 per carton. The tax is imposed pursuant to RCW 82.24.020 upon the sale, use, consumption, handling, possession or distribution of cigarettes. The tax is enforced by means of tax stamps. Retailers are required to either purchase prestamped cigarettes from wholesalers or purchase a supply of stamps from the state which are to be affixed to the cigarettes by the retailer prior to sale.

The cigarette excise tax is not applicable to sales to reservation Indians for their own use or for on-reservation resale to other Indians. See, WAC 458-20-192 and ETB 504.08.192, App. Q. It is only upon resale of cigarettes to non-members of the reservation tribe (chiefly non-Indians) that the State would require reservation retailers to affix state tax stamps and collect and remit the cigarette excise tax to the State. See, ETB 504.08.192.

Prior to the inception of this litigation, the State seized unstamped cigarettes in the stream of interstate commerce bound for the Tribes' reservations. In the future, unless restrained, the State will continue



to seize unstamped cigarettes in the stream of interstate commerce bound for the Tribes' reservations to the extent that such unstamped cigarettes can reasonably be attributed to be for sale to non-members of the Tribe, or non-Indians.

The State also imposes a sales tax on the sale of tangible personal property and certain services at retail. During the time relevant to this litigation, the sales tax rate (combined state-local) was 5 percent. RCW 82.08.020. The sales tax is imposed upon the purchaser, and the retailer is required to collect the tax and remit it to the state. RCW 82.08.050. It is undisputed that the legal incidence of the sales tax is upon the purchaser, and that the sales tax applies to sales of cigarettes to non-Indians, absent some exemption based upon the federal constitution. The sales tax does not apply to sales to reservation Indians where delivery takes place upon the reservation. WAC 458-20-192.

D. **State Motor Vehicle, Travel Trailer and Camper Excise Taxing Scheme.** The State's motor vehicle tax (MVET) is imposed pursuant to RCW 82.44.020. It is an excise tax imposed for the privilege of using any motor vehicle in the state. During the time relevant to this litigation, the annual amount of the tax was 2 percent of the fair market value of the motor vehicle. RCW 82.44.020. The camper and travel trailer excise taxes are imposed pursuant to RCW chapter 82.50. The excise tax on campers and trailers is slightly different in enforcement, but in practical

operation and effect the tax is virtually the same as the MVET. The camper and travel trailer excise tax is an annual excise tax imposed on the privilege of using campers and trailers in the State of Washington, levied at an annual rate of 1 percent of the fair market value of the vehicle. RCW 82.50.400, -.410. When the tax is paid, a license is issued, entitling the camper or trailer to use of the state's public highways. RCW 82.50.540.

E. **Action of the Three-Judge District Court.** The three-judge district court began by deciding that it had jurisdiction over the parties and subject matter of the action. Recognizing that Indian tax exemptions normally raise questions only under the Supremacy Clause, U.S. Const. art. VI, cl. 2, the court nevertheless found that the Tribes' claims for relief raised a substantial federal question under the Commerce Clause. Consolidated opinion, App. A, p. 14. This Commerce Clause claim was based upon the State's attempts to seize unstamped cigarettes moving in interstate commerce to the Tribes.

On the merits, the court began by analyzing the state cigarette taxing scheme as applied to sales by reservation Indians to non-Indians. The court found that the legal incidence of the state's cigarette and sales taxes fell upon the non-Indian purchaser. Consolidated decision, App. A, pp. 17-24. Thus, Washington's cigarette and sales taxing scheme was similar to Montana's cigarette taxing scheme at issue in *Moe*, *supra*; i.e., a tax imposed upon the purchaser to be collected by the seller.



The court next disposed of the Tribes' contentions that the state's cigarette taxing scheme had been preempted by federal legislation and policy underlying the Indian Traders Act, 25 U.S.C. §261, *et seq.*, the Indian Reorganization Act of 1934, 25 U.S.C. §476, *et seq.*, the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450 and the Indian Financing Act of 1974, 25 U.S.C. §1451, *et seq.* The court found nothing in these acts which attempted to implement a federal policy by regulating a subject matter closely related to that touched on by the state's cigarette tax.

The court, however, held that the state's cigarette and sales taxing schemes (as applied to cigarettes) have been preempted by the passage of tribal ordinances regulating and taxing the sale of cigarettes and, furthermore, that the imposition of a state cigarette tax on top of a tribal cigarette tax interferes with the right of Indian self-government as articulated in *Williams v. Lee*, 358 U.S. 217 (1959).

The court found that the Tribes were exercising federally delegated power to tax non-Indians. The court found this delegation in section 16 of the Indian Reorganization Act of 1934, which delegates to Indian tribes those "powers vested in any Indian tribe or tribal council by existing law." According to the court, the power to tax Indians and non-Indians was a power vested in an Indian tribe by existing law, cit-

ing *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956). The court reasoned that since the tribal taxing scheme regulated the same subject matter as the state taxing scheme, the state's scheme must give way.

Alternatively, the court held that the state's cigarette taxing scheme constitutes an impermissible interference with tribal self-government. The court found that the economic effect of the combined state and tribal cigarette taxes would result in depleting the Tribes' tax base and possible elimination of essential revenues needed for tribally sponsored programs. The majority distinguished *Moe, supra*, on the grounds that in *Moe* there was no tribal tax and the tribe itself received no direct benefits from cigarette sales.

Judge Kilkenny, in dissent, found that *Moe* was indistinguishable. He noted that the only difference was appellee Tribe's decision to levy a tax on the sale of cigarettes. In his view, "[t]he mere imposition of a tribal tax does not rise to the level of a preemption of the taxing field on that article." App. A, p. 63.

The court found that the state sales tax, as applied to the sale of cigarettes, was similarly preempted. However, in Cause No. 3909, the court held that in the absence of a tribal tax on sales of articles other than cigarettes, the state's sales tax was not preempted, and Indian retailers could be required to collect and remit the tax to the state.



Finally, the court held that the state could not impose its motor vehicle, travel trailer and camper excise taxes upon vehicles owned by the tribes and their reservation resident members when such vehicles were driven partly on and partly off the reservation. The court found that Washington's vehicle excise taxes were no different in practical operation and effect from Montana's personal property tax on automobiles invalidated by this court in *Moe*. App. A, p. 42. Judge Kilkenny, again in dissent, reached no conclusion as to the validity of the state's vehicle excise taxes. In his view, the record is inadequate to rule on a tax falling between the on-reservation activity considered in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) and the off-reservation activity considered in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

## THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1. **Whether an Indian tribe can preempt state taxing power over non-Indians on an Indian reservation is a federal question and involves fundamental questions concerning the status of Indian tribes in the American federal system of government.**

It is difficult to underestimate the importance of the federal questions involved in this appeal. Essentially, the court below has held that an Indian tribe, by the mere stroke of a pen, can preempt state taxing power over non-Indians engaged in economic activities on an Indian reservation. This holding goes far

beyond any rulings of this Court and results in a fundamental reallocation of powers among states, Indian tribes, and the federal government.

The political, social, and economic consequences of the lower court's holding are far-reaching. Solely in terms of political consequences, the holding elevates Indian tribes to the status of full sovereigns, with complete taxing and regulatory power over non-Indians residing or doing business on Indian reservations. Just last term, this Court held that Indian tribes possess no criminal jurisdiction over non-Indians and may not assume such jurisdiction unless *v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). As noted by the Court:

> "* * * Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status.*' " *Oliphant*, *supra*, 435 U.S. at 208.

Whether exercising the taxing power over non-Indians is inconsistent with the Tribes' status is an important federal question. It raises a number of troublesome questions about the rights of non-members of the Tribe paying a tax to a government in which that person has no right to representation. See, 1 Final Report of the American Indian Policy Review Commission, 179-181, 595-596 (1977).

> "Such [tribal] taxation raises the question of the rights of a nonmember of the tribe paying a tax to a government in which that person has no right to representation. Governments generally, however, may tax noncitizens without regard to representation when they are within the territorial jurisdiction of that government. However, where non-Indians live within the boundaries of the reservation and have no hope of ever becoming members of the tribal government, the issue is more difficult." Commission Report, *supra*, p. 179.



Whether Congress has in fact delegated to the Tribes the power to tax non-Indians is an important federal question. The lower court found that section 16 of the Indian Reorganization Act of 1934 did constitute congressional authorization for Indian tribes to exercise taxing jurisdiction over non-Indians, citing one circuit court opinion, *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956).

In contrast, this Court in *Oliphant* decided that section 16 of the Indian Reorganization Act did not constitute congressional authorization for tribes to assume criminal jurisdiction over non-Indians. Certainly, this Court must address the question of delegation of taxing power over non-Indians under the auspices of the Indian Reorganization Act. The state contends that Congress has never delegated this taxing power to an Indian tribe.

Another significant consequence of the holding below is the elevation of tribal governments to a position of political power far outstripping that of the states themselves. While it may be conceded that Indian tribes are "sovereigns" when dealing with members of the tribe on Indian reservations,[22] this

[22]See, e.g., *United States v. Wheeler*, ..... U.S. ....., 98 S. Ct. 1079 (1978).

Court has never held that Indian tribes have greater power than states when dealing with non-Indians on Indian reservations. Assuming, arguendo, that Indian tribes do have the power to tax non-Indians, still there has been no decision of this Court which even remotely supports a holding that the tribes' taxing power — inherent or delegated — is superior to the state's taxing power over its own non-Indian citizens.

Lower courts which have considered this problem have uniformly applied principles of intergovernmental immunity from taxation in order to resolve conflicts between state and tribal taxing power over non-Indians. See, *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), cert. denied, 405 U.S. 933 (1972); *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977). The rationale of these decisions is simply that where two independent governments have taxing power, both taxes may be levied so long as neither is laid directly upon the other government or discriminates against the other government; *cf.*, *United States v. City of Detroit*, 355 U.S. 466 (1958).

The alternative, of course, is for a court to make a choice between governments or to hold that neither government has taxing power.

Whatever the ultimate result, the question of tribal preemption of state taxing power demands full briefing and argument before this Court. Both the Tribes and the State can fairly claim an interest in



taxing non-Indians on Indian reservations. Historically, states have freely taxed such non-Indians. *See* e.g., *Thomas v. Gay*, 169 U.S. 264 (1898); *United States v. McGowan*, 302 U.S. 535 (1938). Certainly, the imprimatur of this Court is required if states are to be ousted of this historically exercised power.

2. **Whether a state can impose nondiscriminatory reporting and auditing requirements on Indians designed to insure that taxes collected on sales to non-Indians are properly accounted for is a substantial federal question.**

The ability of a state to enforce a tax collection requirement against Indian retailers with respect to sales to non-Indians raises important questions pertaining to the exercise of state police power in aid of the taxing power. These enforcement questions were specifically reserved by this court in *Moe*. *See*, *Moe*, *supra*, 425 U.S. at 468, n. 6.

The State's record keeping requirements as applied to Indian tribes and Indian retailers are set forth in ETB 504.08.192. App. Q. All persons, including Indian retailers are required to keep detailed records of sales to Indians. Persons making sales to Indians are required to maintain books and records open to the State's inspection containing the names and tribal affiliation of Indian purchasers, the Indian reservations within which sales were made and the dollar amounts and dates of sales.

The court below held that these requiremnets, as applied to reservation Indians, violated the Indian Traders Act, at least insofar as reservation Indians

were licensed Indian traders. The lower court viewed this as an interference with the rights of Indian traders under the Indian Traders Act, citing *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965).

*Warren* dealt with state taxation of an Indian trader with respect to sales to reservation Indians. Here, the State is not attempting to impose a tax upon Indian traders with respect to sales to non-Indians. Rather, the State is attempting to enforce regulations which will aid the state in ascertaining the amount of sales to *non-Indians*. The record in this case reflects the fact that in excess of 90 percent of the cigarette sales in question were made to non-Indians. The State, in an attempt to make these record keeping requirements a truly "minimal burden", while at the same time insuring a manageable "audit trail" is merely requiring reservation Indians to account for 10 percent of their sales, rather than 90 percent of their sales.

Thus, in reality, the State's collection requirements do not conflict with the Indian Traders Act. In fact, requiring reservation Indians to account for sales to Indians is considerably less of a burden than requiring accounting for all sales to non-Indians.

Ultimately, the question of enforcement is one of state police power in aid of the taxing power. In *Moe*, the court found that the collection requirement was not a tax and did not frustrate tribal self-government. Furthermore, the *Moe* Court recognized that the



major beneficiary of the refusal of tribes to collect the state's tax was the non-Indian purchaser. Thus, fairly read, *Moe* stands for the proposition that where reservation Indians establish businesses within Indian country primarily for the benefit of non-Indians, the effect of which is to encourage, aid, and abet non-Indians in disobeying with impunity state tax laws, the state may exercise its police power jurisdiction over reservation Indians to the degree necessary to prevent such wholesale violations, so long as the exercise of such police power is not discriminatory or otherwise constitutionally suspect.

Here, there is no claim that the State's collection requirements are discriminatory. In fact the same rules apply to all retailers, whether Indian or non-Indian and whether located on or off an Indian reservation.

Thus, the question of whether the State has available to it the full range of its police power to assist in enforcing a collection requirement which this court has found to be lawful, is a substantial federal question. As Judge Kilkenny stated in his dissent:

> "I would hold that the State of Washington can validly impose the cigarette and sales tax in question and require the licensed dealers to account for the tax on all sales to non-Indians, keeping an adequate record of such sales. Because the tax, in my opinion, is legal, it follows that some type of a record must be kept."[23]

[23]The District Court did not deal with the question of the State's power to enforce collection responsibility by seizure and sales of unstamped cigarettes being shipped in commerce to Indian tribes

3. **Whether a state may impose taxes, the legal incidence of which fall upon a reservation Indian who is not a member of the tribe occupying the reservation, is a substantial federal question.**

The lower court held that the State is without power to tax reservation Indians who are not members of the tribe occupying the reservation. The court based its holding upon the opinion of the District Court in *Confederated Salish & Kootenai Tribes v. Moe*, 392 F.Supp. 1297, 1312 (D. Mont. 1975). However, the issue of state taxing power over nonmembers of the tribe was not before this Court in *Moe*, and this Court expressed no opinion as to the lower court's holding. *See, Moe, supra*, 425 U.S. at 480, n. 16.

In simple terms, the question is whether the federal government has preempted the field of state taxation of Indians who have left their own reservations. This question must be decided with reference to the particular treaties and federal statutes which define the limits of state power over Indians. *McClanahan v. Arizona Sate Tax Commission*, 411 U.S.

for ultimate resale to non-members of the tribe. Nor did the District Court rule on whether the State could enforce a collection responsibility by seizure and sale of property belonging to the tribe or to individual members thereof. It was not necessary to reach these questions with respect to the cigarette taxing issues, because the court held the State could not impose its tax. In those circumstances where the State could impose its tax, the court assumed that the tribe would voluntarily comply. These two enforcement issues have been raised on appeal. However, since the court below did not rule on these issues, the State expects that this Court, in accordance with its long established custom, will not rule on these issues. However, the State wishes to make it clear that it is not abandoning on appeal its contentions with respect to these issues. In the event this Court decides state taxing power has not been preempted, it will be necessary to remand the case back to the District Court for consideration of these enforcement issues.



164 (1973). And, of course, absent clear statutory guidance, courts will not imply tax exemptions. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

The lower court cited no treaty rights or federal statutes in support of its holding that Indians who are not members of the tribe are entitled to exemption from state taxation. Lower courts which have considered the problem have held that Indian tax immunities apply to Indian persons who reside on reservations but are not enrolled members of the tribe occupying the reservation. *Fox v. Bureau of Revenue*, 87 N.M. 261, 531 P.2d 1234 (1975), cert. denied, 424 U.S. 933 (1976); *Dillon v. Montana*, 451 F. Supp. 168 (D.Mont. 1978). The rationale of these decisions is that federal statutes authorizing federal court jurisdiction over crimes committed by Indians on another tribe's reservation (e.g. 18 U.S.C. §1153) and the definition of "Indian" for purposes of the Indian Reorganization Act (25 U.S.C. §479), manifest congressional power over Indians whether or not on their own reservations.

The State does not dispute that Congress has assumed jurisdiction for certain purposes over Indians residing on another tribe's reservation. Indeed, Congress has assumed jurisdiction over Indians not residing on any reservation. *See*, e.g., *Morton v. Ruiz*, 415 U.S. 199 (1974), in which the Court construed 25 U.S.C. §13, dealing with expenditures by the BIA

for general assistance to Indians, to encompass and authorize the expenditure of federal funds for non-assimilated needy Indians residing *on or near* an Indian reservation.

It is the State's position that these congressional enactments do not require this Court to find a tax exemption by implication for such non-tribal Indians.

4. **Whether a state can impose an excise tax on vehicles owned by reservation resident Indians and driven partly on and partly off the reservation is an important federal question.**

The court below held that the State could not impose its motor vehicle, camper, and travel trailer excise taxes on vehicles owned by the Tribe and its reservation resident members and driven partly on and partly off the reservation. The court based its holding upon this Court's decision in *Moe*, in which this Court held that Montana could not impose its personal property tax on automobiles owned by reservation resident members. This Court's holding in *Moe* was based upon the rule of *McClanahan v. Arizona State Tax Commission*, *supra*, denying states the power to impose taxes upon reservation Indians, the legal incidence of which falls upon such reservation Indians, with respect to activities or property located wholly within an Indian reservation.

It is the State's position that *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and not *McClanahan*, controls this issue. In *Mescalero*, this Court sustained New Mexico's gross receipts tax as



applied to the conduct of a tribally owned ski resort business located outside reservation boundaries. The general rule, as summarized by this Court in *Mescalero*, *supra*, 411 U.S. at 148-149 is:

> "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state."

Here, the legal incidence of Washington's vehicle excise taxes falls upon the owner of the vehicle. So long as the vehicle is used entirely on the reservation, *McClanahan* dictates that no tax can be imposed. However, because there are no express federal laws to the contrary, the State contends that it may impose its vehicle excise taxes at the time the vehicles are used off the reservation.

This is an important federal question. It falls precisely between the totally on-reservation activities considered by this Court in *McClanahan* and the totally off-reservation activities considered by this Court in *Mescalero*. Full briefing and argument is needed on this question to enable this Court to articulate the circumstances under which reservation Indians going beyond reservation boundaries may be subject to this State's tax laws.

## CONCLUSION

The federal questions raised in this appeal are clearly substantial. They require briefs on the merits and oral argument for proper consideration and resolution. The State submits that the decision of the District Court is directly contrary to the reasoning and result of this Court's decision in *Moe*. If allowed to stand, the decision would leave the continued viability of *Moe* to the whim of each Indian tribe. Furthermore, the decision below elevates Indian tribes to the position of sovereign nations, a concept which has been rejected by this Court for over 100 years.

Therefore, in order for this Court to protect the integrity of its decisions, and in order to dispose fully of the substantial questions of state taxing power on Indian reservations, it is necessary that this Court note probable jurisdiction of this appeal and set it for full briefing and argument.

DATED this 13th day of October, 1978.

Respectfully submitted,

SLADE GORTON,
*Attorney General,*
*State of Washington*

RICHARD H. HOLMQUIST,
*Senior Assistant Attorney General*

MATTHEW J. COYLE,
*Assistant Attorney General*

*Attorneys for Appellants.*

Supreme Court, U. S.
FILED
OCT 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT

## OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; and ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,

*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

*Appellees,*

(continued on inside cover)

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

## APPENDIX TO JURISDICTIONAL STATEMENT

SLADE GORTON,
*Attorney General*
*State of Washington*

RICHARD H. HOLMQUIST,
*Senior Assistant Attorney General*

MATTHEW J. COYLE,
*Assistant Attorney General*

*Attorneys for Appellants*

Office and Post Office Address: Temple of Justice, Olympia, Washington 98504. Telephone (206) 753-5528

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

STATE OF WASHINGTON,

*Appellant*,

v.

UNITED STATES OF AMERICA,

and

CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION,

*Appellees*.

IN THE

# SUPREME COURT

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OCTOBER TERM, 1978

No. . . . . .

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*Appellants*,

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SLADE GORTON,
*Attorney General*
*State of Washington*

RICHARD H. HOLMQUIST,
*Senior Assistant Attorney General*

MATTHEW J. COYLE,
*Assistant Attorney General*

*Attorneys for Appellants*

Office and Post Office Address: Temple of Justice,
Olympia, Washington 98504. Telephone (206) 753-5528

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*Appellees.*



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## APPENDIX A

[*filed Feb. 22, 1978; Clerk's stamp deleted*]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 3868
CONSOLIDATED DECISION

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,
*Plaintiffs,*

v.

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; and ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,
*Defendants.*

No. 3909

UNITED STATES OF AMERICA,
*Plaintiff,*

v.

STATE OF WASHINGTON,
*Defendant,*

CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION,
*Intervenor-Plaintiff.*

Before: KILKENNY, Circuit Judge, EAST and TURRENTINE, District Judges*

EAST, District Judge:

These causes, Nos. 3868 and 3909, were by stipulation of the parties consolidated for hearing and submitted to the Court on their respective merits following oral argument at Seattle, Washington on March 28, 1977.

CAUSE NO. 3868

**PARTIES:**

The plaintiffs are Confederated Tribes of the Colville Indian Reservation, Lummi Indian Tribe, and Makah Indian Tribe (Tribes).

The defendants are the State of Washington; Charles Hodde, Director, Department of Revenue, State of Washington; Jack G. Nelson, Director, Department of Motor Vehicles, State of Washington; and Robert S. O'Brien, Treasurer, State of Washington (State).

**JURISDICTION:**

We note jurisdiction of these causes pursuant to 28 U.S.C. § 1362, 28 U.S.C. §§ 2201 and 2202, and 28 U.S.C. § 2281.[1]

*Originally the statutory three-judge District Court hearing the above was comprised, pursuant to the designation of Chief Judge Richard H. Chambers for the Ninth Circuit under date of June 20, 1973, of the Honorable John F. Kilkenny, Senior U.S. Circuit Judge for the Ninth Circuit, William G. East, Senior U.S. District Judge for the District of Oregon, and Charles L. Powell, Senior U.S. District Judge for the Eastern District of Washington. Thereafter pursuant to the designation of Chief Judge Richard H. Chambers for the Ninth Circuit under date of May 10, 1974, the composition of the statutory three-judge District Court herein was redesignated by the designation and appointment of the Honorable Howard B. Turrentine, U.S. District Judge for the Southern District of California, in lieu of the Honorable Charles L. Powell, and the redesignation and appointment of the Honorable John F. Kilkenny and the Honorable William G. East.

[1]28 U.S.C. § 2281 was repealed by Act of August 12, 1976, Pub. L. No. 94-381, § 1, 90 Stat. 1119. However, this action is not affected thereby since it was pending on the date of enactment. *Id.* § 7.



**HISTORY OF PROCEEDINGS:**

This action was commenced on May 17, 1973, and District Judge Powell on November 5, 1973, in conformity with 28 U.S.C. § 2284, issued a temporary restraining order enjoining the State from enforcing its cigarette and tobacco products taxes against the Tribes. By stipulation, the parties agreed to the continuance of the restraining order pending review by the full three-judge District Court. On September 6, 1974, the full Court converted the temporary restraining order into a preliminary injunction. During the ensuing months, discovery proceeded until this Court stayed further proceedings pending the Supreme Court's decisions in *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), and *Bryan v. Itasca County*, 426 U.S. 373 (1976). Following the Supreme Court's disposition of those cases and after extensive discovery proceedings and briefing, the causes with the issues refined were submitted for decision upon stipulated facts as supplemented by deposition testimony and affidavits.

**THE TRIBES' CAUSE:**

The Tribes now seek declaratory relief, with injunctive enforcement, from the State's statutes and administrative regulations imposing taxes and collection procedures upon on-reservation sales to nonmembers of the Tribes by tribally licensed retailers (Dealers) of cigarettes (R.C.W. 82.24) and tobacco products (R.C.W. 82.26), and from the State's statutes and administrative regulations imposing taxes upon motor vehicles (R.C.W. 82.44) and mobile homes, travel trailers and campers (R.C.W. 82.50) owned by the Tribes and/or their members residing within the reservations. In addition, the Tribes seek damages against the State arising out of actions taken to enforce assessments of the challenged cigarette taxes. The Tribes also seek declaratory relief, with injunctive enforcement, from the State's exercise of civil and criminal jurisdiction over the Tribes and their members residing on the reservations (R.C.W. 37.12).

**STATE'S DEFENSE AND CAUSE:**

The State generally contests the Tribe's claims and seeks declaratory relief of lawful enforcement of its challenged taxing schemes as presently administered.

**FACTS:**

**A. Tribes:**

Each of the Tribes is a United States Government recognized sovereign Indian tribe governed by a business or tribal council under a constitution and bylaws approved by the Secretary of Interior.[2]

The Colville Indian Reservation was established by Presidential Executive Order on July 2, 1872, 1 Kapler, Indian Affairs, Laws and Treaties, 916 (2d Ed. 1904), and encompasses 1.3 million acres in the northeastern section of the state. Approximately 3,200 of the Tribe's 5,800 enrolled members live on the reservation, constituting about 46 percent of the total population.

The Lummi Indian Reservation was established by the treaty of Point Elliot in 1855, 12 Stat. 927, and encompasses 7,319 acres primarily upon a peninsula near Bellingham, Washington. About 1,250 of the Tribe's 2,000 enrolled members live on the reservation.

The Makah Indian Reservation was established by treaty in 1855, 12 Stat. 939, and encompasses 28,000 acres at the northwestern tip of the Olympic Peninsula. Approximately 900 of the Tribe's 1,000 members live on the reservation, constituting about 63 percent of the total population of the reservation.

Each of the reservations is isolated and underdeveloped; most essential goods and services are located off the reservations.[3] Most Indian households on the reservations own at least one automobile, and the Tribes own numerous motor vehicles. While some of the tribally

[2]Although the Lummi and Colville Tribes have a constitution approved by the Secretary of the Interior, the respective members of the Tribes voted in 1935 not to come under the Indian Reorganization Act of 1934, 25 U.S.C. § 476, *et seq.* The Makah Tribe, on the other hand, is organized under the Indian Reorganization Act.



and individually owned vehicles are operated exclusively on the reservation, others are operated on and off the reservation. Many Indian families reside in mobile homes on the reservations, and other Indian families are obligated for the purchase or have planned the future purchase of mobile homes for on-reservation location. The Colville and Makah Tribes are plagued by unemployment rates of 33 percent and 60 percent, respectively, and all of the Tribes are desirous of economically developing their reservations to stimulate employment and generate additional tax revenues to help fund programs run by the tribal governments. These programs are designed to improve the economic well-being, health, education and social welfare of the Tribes' members.

**B. State's Enforcement of the Statutes:**

The State has for a period of nine years attempted to tax cigarettes and tobacco products sold by Indians on the Tribes' reservations. Presently the cigarette tax amounts to $1.60 per carton. The tax is imposed by requiring Dealers to sell only cigarettes to which tax stamps have been affixed. Dealers are permitted to purchase either prestamped cigarettes or a supply of stamps from the State which are affixed to the cigarettes by the Dealer prior to sale, in which case the Dealer is entitled to a specified rate of reimbursement from the State. However, WAC 485-20-192 (Rule 192) and excise tax bulletin ETB 504.08.192, November 24, 1976, restrict the taxes on cigarettes and tobacco products to sales to non-Indians by Indian tribes and Indians, as defined therein. That is, the State construes the taxes as being inapplicable to sales to Indians for their own use or for on-reservation resale to other Indians.[4]

[3]There is no dispute over the demarcation of the exterior boundaries of the several reservations.

[4]Inititally, the State claimed the right to tax all tribal cigarette sales regardless of whether they were made to Indians or non-Indians. This contention was asserted on theory that the congressional grant of civil jurisdiction to the states conferred by Pub. L. No. 83-280 (see

Under R.C.W. 82.24.090, 82.32.070, Rule 192 and the excise tax bulletin, Dealers are required to keep certain specified records related to taxable and nontaxable transactions. Neither the Tribes nor their Dealers have sought authorization from the State to possess unstamped cigarette products and each has professed that it will not comply with State's cigarette and tobacco product taxing scheme.

On December 19, 1972, in an effort to enforce the cigarette taxing scheme, the State issued orders to tribal outlets on each reservation assessing unpaid taxes alleged to be due under R.C.W. 82.24, and in April, 1973, resorted to seizures of unstamped cigarettes in the stream of interstate commerce and bound for the Tribes' reservations. Furthermore, the State declared its intention to continue such seizures in the future; however, such seizures were temporarily enjoined as above delineated.

C. **Tribal Retailers' Taxing Schemes:**

Each Tribe, during the pretrial development of the ultimate issues in these causes, enacted ordinances regulating the sale, distribution and taxation of cigarettes and tobacco products on its reservation. Each tribal ordinance was approved by the Secretary of Interior of the United States. Pursuant to the respective ordinances, the Tribes have established one or more tobacco outlets on their respective reservations.

The Dealer at each tribal tobacco outlet is a federally licensed Indian trader and a tribally licensed dealer who manages the tribally owned tobacco business outlet. Simultaneously, the Dealer at each tribal tobacco outlet, except at the Makah Resort, manages his own separate business of selling a variety of merchandise at retail. As remuneration for managing a tribal tobacco outlet, each

discussion of the State's assumption of Indian jurisdiction, *infra*) encompassed grant of power to tax reservation Indians. However, this theory was rejected by the Supreme Court in *Bryan*. Accordingly, the State has narrowed its claims and now argues only that it may tax tribal cigarette sales to nonmembers of the Tribes.



Dealer is entitled to retain the gross revenue derived from sale of cigarettes and tobacco products in excess of the wholesale distribution price and excise tax levied by the respective Tribe.

All cigarettes and tobacco products are purchased with federally restricted tribal funds and from authorized wholesalers outside the state, which are shipped directly to the respective Tribes by sealed cargo trucks of Interstate Commerce licensed carriers. Distribution is made to the Dealers when tribal cigarette taxes fixed by the tribal or business council are collected.

The tribally levied cigarette tax ranges from forty to fifty cents per carton. Tribal ordinances read that the cigarette tax imposed by each Tribe is a tax upon distribution of cigarettes on the reservation by the respective Dealers, and the tax must be added to the retail selling price. The Tribes' cigarette taxes are an important source of revenue for the funding of the Tribes' sponsored programs for social and economic development. For example, from 1972 through 1976, during which time the Tribes refused to impose the State's cigarette taxes, the Colville Tribe earned approximately $265,760 from its cigarette tax while the Lummi and Makah Tribes earned approximately $54,440 and $13,490, respectively, from their cigarette taxes.

Due to the competitive advantage enjoyed by the Tribes over retailers who do impose the State's tax, nearly 90 percent of the Tribes' sales are made to non-Indians. The State tacitly concedes the Tribes' source of cigarette tax revenue would dry up if they were forced to add the State tax to the cost of their cigarettes. The facts dictate that the tribal taxes could not be a continuing source of income if tribal cigarette sales to non-Indians are also subject to State's cigarette tax; tribal cigarette sales to non-Indians would be eliminated and the cigarette sales commerce between the Tribes and non-Indians would be

destroyed. Thus, each Tribe's ability to fund its sponsored programs would suffer substantial interference.[5]

The Tribes' ordinances exercised police power as well as taxing power. The respective ordinances provide:

(a) The tobacco products, including cigarettes, shall remain the property of the Tribe until sold to the ultimate customer;

(b) A Dealer shall first obtain tribal and federal trader's licenses supported with adequate person and property liability insurance coverage on the Dealer's premises;

(c) A Dealer shall not sell tobacco products, including cigarettes, to minors, nor more than a limited number of cartons of cigarettes per non-Indian sale; and

(d) For violation penalties.

In short, each ordinance reads as a comprehensive scheme for the licensing, regulation and taxation of the sale of cigarettes on the reservations.

**D. State's Assumption of Civil and Criminal Jurisdiction:**

State's assumption of civil and criminal jurisdiction over Indians and Indian tribes has been previously

[5]Cigarettes are highly price elastic and even a small difference in price can have a substantial effect on purchasing habits. Although the Tribes impose a tax of about 40 to 50 cents per carton, a carton of cigarettes sells for about $1.10 to $1.20 less on the reservation than off the reservation. If, however, the tribal and State taxes were imposed, a carton of cigarettes would cost 40 to 50 cents more per carton on the reservation than off the reservation.

See the affidavit of Mr. Ronald L. Trosper, an economist who specializes in the area of American Indian economic development. He received his PhD in Economics from Harvard in 1974, is a member of the American Economic and Western Economic Associations and has served as a consultant to the American Indian Policy Review Commission and to several Indian tribes. He has also published articles in the field of Indian economic development. At the time he rendered his opinion, he was familiar with the State and tribal taxing ordinances, the economic conditions on the reservations and the factors which influence the sale of cigarettes. The State does not dispute his qualifications as an expert.



discussed by the United States Court of Appeals for the Ninth Circuit. *Confederated Bands and Tribes of the Yakima Indian Nation v. Washington*, 552 F.2d 1332 (9th Cir. 1977) (*Yakima 2; Confederated Bands and Tribes of the Yakima Indian Nation v. Washington*, 550 F.2d 443 (9th Cir. 1977) (*Yakima 1*); and *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966). We find no need here for elaboration of those discussions.

We take judicial notice that prior to 1953, the Federal Government exercised exclusive jurisdiction over Indian tribes and their reservations.[6] In 1953, Congress enacted the Act of August 15, 1953, Pub. L. No. 83-280, Ch. 505, 67 Stat. 588-90, which provided five named states with criminal and civil jurisdiction over Indians and Indian reservations and provided that certain other "option" states (including the State), with constitutional or statutory disclaimers of Indian jurisdiction, could assume such jurisdiction by amending their constitutions or statutes where necessary to do so.

The State's legislature has asserted civil and criminal jurisdiction over Indians and Indian reservations pursuant to the authority of Laws of 1957, Ch. 240, as amended by Laws of 1963, Ch. 36, codified as R.C.W. 37.12. In the absence of a tribe's consent, the State assumed jurisdiction over Indians on nontrust land and non-Indians on trust and nontrust land to the fullest extent permissible under Pub. L. No. 280.[7] With respect to trust land, the State assumed jurisdiction over Indians only as to eight

[6]This principle was first established in *Worcester v. Georgia*, 31 U.S. 515 (1832). And over the years only certain limited exceptions were carved out. *E.g., New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946), state court jurisdiction over crimes committed by non-Indians against each other on Indian reservations.

[7]The scope of civil jurisdiction offered by Pub. L. 280 was apparently quite limited. The primary concern of Congress in enacting Pub. L. No. 280 was to combat lawlessness on Indian reservations, *Bryan*, 426 U.S. at 379, and Congress was concerned only secondarily with extending the scope of the states' civil jurisdiction. The Supreme Court found that Pub. L. 280 did not confer the power to assume

subject matter areas.[8] As to consenting tribes, the State obligated itself to assume jurisdiction "to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state." R.C.W. 37.12.021. The Colville Tribe has so consented, while the Makah and Lummi Tribes have not. Accordingly, the State asserts "total" jurisdiction over the Colville Tribe, but only "partial" jurisdiction over the Makah and Lummi Tribes.

## DISCUSSION AND CONCLUSIONS:

### A. Jurisdictional Issues:

#### (1) State's Assumption of Indian Reservation Jurisdiction:

At the outset, we are faced with the State's contention that this Court, as a statutory three-judge district court, has no jurisdiction over the Tribes' claim that the State's

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general civil regulatory authority. Rather, in this regard it relates only to the application of state civil law to court proceedings. *Id.*

[8]R.C.W. 37.12.010 provides:

"The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of R.C.W. 37.12.021 [tribal consent] have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further*, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted."



assumption of Indian reservation jurisdiction, pursuant to R.C.W. 37.12, was, *inter alia*, violative of the Equal Protection Clause of the Fourteenth Amendment.

Prior to the enactment of Pub. L. No. 94-381, 28 U.S.C. § 2281 required the designation of a statutory three-judge District Court whenever an action based upon a substantial United States constitutional question sought to enjoin the enforcement of a state statute of state-wide application. A claim is constitutionally insubstantial only if it is "essentially fictitious," "obviously frivolous," "wholly insubstantial" or "obviously without merit"; that is, "if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Goosby v. Osser*, 409 U.S. 512, 518 (1973). The decision in *Yakima 2* forecloses the State's contention that the Tribes' Fourteenth Amendment claim is insubstantial.

*Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962), teaches that in order for such jurisdiction to be appropriate, there must be some basis for injunctive relief. Failure to name any individual official with enforcement responsibility has in the past influenced the United States Court of Appeals for the Ninth Circuit in upholding a District Court's refusal to convene a three-judge court. *Sellers v. Regents of University of California*, 432 F.2d 493, 497-98 (9th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971). The State argues the Tribes have failed to name "as defendants any state officers with significant responsibility for enforcing the full range of state civil and criminal laws on plaintiff's reservations" and that as a consequence this Court "probably" lacks jurisdiction over the appropriate officials which would render any injunction issues "largely illusory." We take this to be a claim that three-judge District Court jurisdiction is lacking because there is no basis for injunctive relief.

The only state officers named as defendants in this action are the State Treasurer, the Director of the State Department of Revenue, and the Director of the State Department of Motor Vehicles. These defendants were named because they have enforcement responsibility over the challenged taxation statutes. It is now clear that the validity of State's assumption of Indian reservation jurisdiction has no relationship to the validity or invalidity of its cigarette and tobacco products taxing scheme as applied to sales by Dealers. *Cf. Bryan.*

Fed. R. Civ. P. 65(d) provides that an order granting an injunction binds, among others, "the parties to the action, their officers, agents, servants, employees, and attorneys." The State has been made a party to this action and, except for the immunity guaranteed it by the Eleventh Amendment to the United States Constitution, any injunctive enforcement issued by this Court would bind State's officers who have the requisite enforcement responsibility.

The State has statutorily waived its Eleventh Amendment immunity to suit in its own courts, R.C.W. 4.92.100. However, such a waiver does not extend to federal court actions. *Ford Motor Co. v. Dept. of Treasury of Indiana,* 323 U.S. 459 (1945). Furthermore, the State has not authorized its court counsel to waive the immunity. *Skokomish Indian Tribe v. France,* 269 F.2d 555 (9th Cir. 1959). *See also Ford Motor Co.* Nevertheless Congress, in the exercise of its enumerated powers, may strip a state of its Eleventh Amendment immunity. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976); *Parden v. Terminal R. Co.,* 377 U.S. 184 (1964). Given the rationale used by the Court in *Moe* (425 U.S. at 472-75) in construing 28 U.S.C. § 1362, we must conclude that Congress has removed the states' Elventh Amendment immunity when a suit is brought by an Indian tribe. *Aquilar v. Kleppe,* 424 F. Supp. 433, 436 (D. Alas. 1976). We conclude the State is a proper party defendant in this



Court and any injunctive enforcement issued against it would run against its officers charged with the requisite enforcement responsibility.

(2) **Tax Claims:**

The parties agree that this Court has jurisdiction over the Tribes' attack on State's cigarette and tobacco products taxing schemes; however, a footnote in *Moe* necessitates a comment. The Tribes' only "constitutional" attack on the validity of the state taxing measures themselves is that those measures are violative of the Indian commerce provision of the Commerce Clause. U.S. Const. art. I, § 8, cl. 3.[9] Note 17 in *Moe* states that after *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), and *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973), attacks on the validity of state statutes imposing taxes upon reservation Indians raise only Supremacy Clause issues which do not fall within the scope of 28 U.S.C. § 2281.[10] Nevertheless, in *Moe* a three-judge court had properly been convened because the case had been filed prior to the decisions in *Mescalero* and *McClanahan.* Similar treatment here is precluded because this action was commenced approximately seven weeks after those decisions.

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[9]Although the Tribes mount several other attacks on State's taxing scheme which are discussed *infra,* these attacks depend in the final analysis upon invocation of the Supremacy Clause and, therefore, do not require the convocation of a three-judge court. *Swift & Co. v. Wickham,* 382 U.S. 111 (1965).

[10]"It is thus clear that the basis for the invalidity of these taxing measures [imposing taxes on reservation Indians], which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause, U.S. Const., Art. VI, cl. 2, and not any automatic exemptions 'as a matter of constitutional law' either under the Commerce Clause or the intergovernmental-immunity doctrine as laid down originally in *M'Culloch v. Maryland,* 4 Wheat. 316 (1819). If so, then the basis for convening a three judge court in this type of case has effectively disappeared, for this Court has expressly held that attacks on state statutes raising only Supremacy Clause invalidity do not fall within the scope of 28 U.S.C. § 2281. *Swift & Co. v. Wickham,* 382 U.S. 111 (1965). Here, however, the District Court properly convened a § 2281 court,

Notwithstanding the language in *Moe*, we conclude this Court has jurisdiction over the Tribes' challenge of the State's statutes providing for the enforcement of its taxing measures through the declaration and seizure as contraband of unstamped cigarettes moving in interstate commerce. That claim raises a substantial federal question under the Commerce Clause.[11]

The State's assertion that it may seize such shipments depends on the validity of the imposition of taxes in the first instance. Thus, a valid challenge to the validity of the taxes could vitiate the need to review the constitutionality of the enforcement provisions. It is clear that a three-judge District Court properly convened has the power to dispose of a case on any ground presented to it. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963); *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285 (1963). Not only does the Court have jurisdiction to adjudicate such issues but to do so furthers the well established principle of deciding constitutional issues only if necessary. *Hagans v. Lavine*, 415 U.S. 528 (1974); *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968); and *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936). Finally, since this Court has expended substantial judicial time with the issues, it is in the interest of "judicial economy, convenience and fairness to [the] litigants" (*United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)) to retain jurisdiction over these claims.

(3) **State's Claims for Relief:**

The State seeks a declaratory judgment that its

because at the outset the Tribe's attack asserted unconstitutionality of these statutes under the Commerce Clause, a not-insubstantial claim since *Mescalero* and *McClanahan* had not yet been decided. *See Goosby v. Osser*, 409 U.S. 512 (1973)." *Moe*, 425 U.S. at 481 n.17.

[11]The Tribes attack these statutes only insofar as the State seeks to apply them to the Tribes. Nevertheless the Supreme Court has held that a three-judge court is required whether the statute was attacked on its face or as applied. *Dept. of Employment v. United States*, 385 U.S. 355 (1966); *Steffel v. Thompson*, 415 U.S. 452, 457 n.7 (1974).



statutes and regulations pertaining to the taxation of retail on-reservation sales of cigarettes, tobacco products and other reservation produced products are valid. Such claim is largely superfluous since, with the exception of the retail sales tax question, the substantive issues raised by these claims must be met by the Court in passing upon the claims of the Tribes. The Tribes have not, however, challenged the validity of the State's general retail sales tax, R.C.W. 82.08. It has been long recognized that absent congressional authorization or possibly their own consent, Indian tribes enjoy immunity from suit in federal, state or tribal courts. *Puyallup Tribe v. Washington Game Dept.*, 97 S. Ct. 2616 (1977); *Turner v. United States*, 248 U.S. 354 (1919); *Hamilton v. Nakai*, 453 F.2d 152, 158-59 (9th Cir. 1972). This immunity extends to freedom from suit on cross claims. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). Since the Tribes have not consented to suit, this Court has no jurisdiction to entertain the State's claims for declaratory relief.[12]

The fact that State might by way of recoupment reduce its liability does not grant it a right of action for affirmative relief. *Bull v. United States*, 295 U.S. 247 (1935).

B. **Subject Matter Issues:**

(1) **Cigarette Tax Issues:**

A decision in this case has been delayed because at one time the parties thought the Supreme Court's forthcoming decisions in *Bryan* and *Moe* would be dispositive of the issues presented here. *Bryan*, in

[12]The State urges that a provision in the corporate charter of the Makah Tribe constitutes a consent to suit. Since such consent would amount to a waiver of what amounts to sovereign immunity, its terms "must be strictly observed and exceptions thereto are not to be implied." *Soriano v. United States*, 352 U.S. 270, 276 (1957). *Cf. United States v. Sherwood*, 312 U.S. 584 (1941). Consent by a tribe to suit in its corporate capacity does not constitute consent to suit against the tribe in its governmental capacity. *Namekagon Dev. Co. v. Bois Forte Res. Hous. Auth.*, 395 F. Supp. 23 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975).

eliminating the State's claim that the grant of civil jurisdiction in Pub. L. No. 280 was a congressional grant of authority to the states to impose taxes upon reservation Indians, did help to narrow the issues presented here. However, *Moe* has generated more confusion or disagreement between the parties than it eliminated. The State maintains that *Moe* resolved most of the remaining issues in its favor while the Tribes argue that *Moe* is distinguishable in some respects and that the Supreme Court reserved decision in others.

In *Moe*, the Confederated Salish & Kootenai Tribes and some of their members brought two actions seeking declaratory and injunctive relief against Montana's cigarette and personal property taxes and vendor licensing statutes as applied to tribal members living on the reservation. The Supreme Court affirmed the rulings of the three-judge District Court, holding that "the personal property tax on personal property located within the reservation; the vendor license fee sought to be applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land; and the cigarette sales tax, as applied to on-reservation sales by Indians to Indians, conflict with the congressional statutes which provide the basis for decision with respect to such impositions. *McClanahan, supra; Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973)." *Id.* at 480-81. The Court also upheld the District Court's ruling that Montana's cigarette sales tax was valid as applied to on-reservation sales by Indians to non-Indians and that Montana could with respect to such sales "require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement" (*id.* at 483) of the tax without placing an unconstitutional burden on tribal self-government or conflicting with any congressional statute. Since the Court found that the Montana cigarette tax was levied upon the non-Indian consumer rather than the tribe or the Indian retailer, the holding did not conflict with the general rule that absent congressional consent, taxation of "Indian



reservation lands or Indian income from activities carried on within the boundaries of the reservation" is impermissible. *Mescalero,* 411 U.S. at 148.

In its attempt to distinguish *Moe,* we are met at the outset with the Tribes' contention that unlike in *Moe,* the tax here must fail because the legal incidence of the tax is imposed directly upon the Tribe or Indian retailer rather than the non-Indian consumer. The State concedes that if the statute is so construed, the tax must fail. The State, however, pointing to the language of its retail sales tax enactment, a recent amendment to its cigarette tax Act, and judicial and administrative construction thereof, argues that at least with respect to sales by Indian retailers, the legal incidence of the tax falls upon the non-Indian consumer.

In situations wherein federal immunity is affected by a determination as to which party to a transaction bears the legal incidence of a state tax, the federal courts "are not bound by the state court's characterization of the tax." *First Agricultural Bank v. Tax Comm'n,* 392 U.S. 339, 347 (1968). For purposes of deciding federal constitutional questions, "where a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser." *United States v. Mississippi Tax Comm'n,* 421 U.S. 599, 608 (1975). *See also First Agricultural Bank; Kern-Limerick v. Scurlock,* 347 U.S. 110 (1954); *Alabama v. King & Boozer,* 314 U.S. 1 (1941). This is true notwithstanding the fact that the seller is legally liable for payment of the tax. *Mississippi Tax Comm'n,* 421 U.S. at 607.

The State in arguing that the legal incidence of the cigarette tax falls upon the non-Indian buyer, rather than tribal sellers, relies by analogy on the provisions of State's general sales tax. R.C.W. 82.08. Such reliance is misplaced. The sales tax statute specifically provides that the sales tax shall be paid by the buyer to the seller, that each seller shall collect the tax from the buyer, and that the amount

of the tax "shall constitute a debt from the buyer to the seller." In addition, it provides that the tax shall be stated separately from the selling price and not be included in the sales price of an item. R.C.W. 82.08.050. Under the standards announced by the Supreme Court, such terms would appear to require a finding that the legal incidence of the tax, as a matter of law, falls upon the purchaser. The cigarette tax by contrast does not have similar provisions. Of particular importance is the absence of any provision requiring that the tax be passed on to the buyer. Thus, the decisions of the Supreme Court do not necessarily require a conclusion that the legal incidence of State's cigarette tax is on the buyer.

Although the statutory language does not irresolutely lead to a conclusion that the legal incidence of the tax falls upon the purchaser, it also does not necessarily require the contrary conclusion that it falls upon the seller. In the final analysis, the key to making the determination is the divination of legislative intent. *First Agricultural Bank*, 392 U.S. at 348. If recourse to the statutory language alone is inadequate, this Court may certainly seek guidance from the interpretations of the enactment by State's judiciary and its executive officers.

In determining the legislature's intent, the obvious starting point must be the language of the applicable statute. The basic structure and intended scope of the statute is set out in R.C.W. 82.24.020 and 82.24.080. The former section imposes the tax and provides in part:

> "There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes in an amount equal to the rate of six and one-half mils per cigarette."

Prior to 1972, § 82.24.080 provided in part:

> "It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, handled, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, or distributes them in the state."



In 1972, this section was amended to read as follows:

> "It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, handled, possessed, or distributed within the state and to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively in accordance with RCW 82.24.020) or distributes them in this state. * * *
>
> "It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event occurring within this state."

Referring to the statutory language, the Tribes point out that tribal retailers possess, handle, and distribute the cigarettes within the state of Washington prior to their sale to the non-Indian buyers. Then pointing to the additional language that the tax is to be imposed upon the occurrence of the first taxable event within the state, they contend that particularly in the absence of a pass-on provision, it is inescapable that the legal incidence of the tax is imposed on the tribal retailers. The Tribes claim the legislature's intent to impose the legal incidence of the tax upon the seller is further supported by the decisions of the Washington Supreme Court in *Makah Indian Tribe v. Tax Comm'n*, 72 Wash. 2d 613, 434 P.2d 580 (1967), and *Canteen Service, Inc. v. Washington*, 83 Wash. 2d 761, 522 P.2d 847 (1974). In *Makah*, the Court upheld the imposition of the cigarette excise tax upon sales by Washington wholesalers to the Makah Tribe on the theory that the legal incidence of the tax fell on the wholesaler rather than the tribe as purchaser. In *Canteen Service*, the Washington Supreme Court, holding that the retail selling price for purposes of determining the amount of the general sales tax to be applied to the sale of cigarettes included the excise tax paid on the cigarettes, stated:

> "The legal incidence of the cigarette stamp tax is upon 'the person who first sells, uses, consumes, handles, * * * or distributes them in the State.' RCW 82.24.080. *Thus, the legal incidence of the tax will fall upon the one who first brings the cigarettes*

*into the state and does any of the mentioned acts.*" 522 P.2d at 848. (Emphasis added).

The State candidly admits that in *Canteen Service*, the Washington Supreme Court held that the legal incidence of the cigarette tax fell upon the retailer but nevertheless maintains that *Canteen Service* is not dispositive of this case.

Focusing on the statutory language which imposes the tax upon the occurrence of the first taxable event, the State reads the statute as imposing the legal incidence of the tax upon the seller where the transaction takes place within the state and involves only non-Indians, but upon the buyer where the transaction involves an on-reservation sale by an Indian to a non-Indian. The State reaches this conclusion by construing the first taxable event language as doing more than merely referring to the first in the series of events enumerated in R.C.W. 82.24.020 and .080. The State argues that properly construed, the statutory language means that an enumerated event is not the first taxable event unless it is constitutionally taxable. Assuming that to be the case, since an Indian retailer is exempt from the imposition of the tax under the Supremacy Clause, it follows that the first taxable event would be the use or consumption by the non-Indian buyer. Conversely, where the transaction involves a seller who is not immune from state taxation, as in *Canteen Service*, the first taxable event would be his possession, handling or distribution of the cigarettes and the legal incidence of the tax would be upon him rather than the purchaser.

The State Department of Revenue has officially adopted the interpretation of R.C.W. 82.24.080 urged on this Court and has published its conclusion in E.T.B. 504.08.192.[13]

[13]E.T.B. 504.08.192 provides in part:

"Under the holding of our Court in *Canteen Service, Inc. v. State*, (83 Wn.2d 761) and *Tonasket v. State* (84 Wn.2d 761) the cigarette tax and tobacco products tax apply upon the 'first taxable event' in this state. This makes a different measure for the sales tax in the case of sales by Indians to non-Indians than is the case for a taxable sale by a non-Indian.



The tribes urge this Court to give no weight to the excise tax bulletin on the theory that it is "a clear subterfuge" and "an attempt to rewrite RCW 82.24.080 in order to make it valid * * * *" While we recognize that the State's agencies have no power to amend state legislation by administrative rules or bulletins, it is proper to give weight to such pronouncements in determining the meaning of its statutes. *Pierce County v. State*, 66 Wash. 2d 728, 404 P.2d 1002 (1965); *Pringle v. State*, 77 Wash. 2d 569, 464 P.2d 425 (1970)

This interpretation also draws support from several other sources including a recent amendment to the cigarette tax statute. In September, 1970, in response to an inquiry from a member of the state legislature, the Attorney General of the state of Washington issued an opinion, AGO 1970 No. 20, which recognized that the legal incidence of the tax could shift depending on the circumstances surrounding the sale. In part, this opinion stated that in situations wherein State lacked jurisdiction to impose its cigarette tax upon Indian retailers, "if the purchaser from such retailer is a non-Indian * * * the duty to buy the cigarette excise tax stamps, and thereby to pay the tax, devolves on this purchaser * * * *" *Id.* at 13 n.5.[14] Of more significance is the language in

"a. *Sale by an Indian to a Non-Indian*: Here the first taxable event is the possession by the non-Indian and therefore the cigarette or tobacco products tax due on the sale is *not* a part of the selling price on which the sales tax is due.

"b. *Sale by a Non-Indian*: Here the taxable incidence falls on the first handler, distributor, or seller and thus the first taxable event occurs when the products are first handled, distributed, or sold within this state Since this occurs prior to the retail sale, the cigarette or tobacco products tax is part of the selling price, even in the case of sales, which are sales tax exempt under paragraph 2, above. *Canteen Service, supra.*"

[14]A major premise of the opinion was that Pub. L. No. 280 was a congressional grant of power to the states to assume civil jurisdiction over the reservation Indians including the power of taxation. The fact that this theory was later repudiated by the Supreme Court in *Bryan* does not detract from the opinion's comment on the legal incidence issue.

*Tonasket v. State*, 84 Wash. 2d 164, 525 P.2d 744 (1974), which decision was issued by the Washington Supreme Court shortly after its decision in *Canteen Service*. In *Tonasket*, the Washington Supreme Court affirmed the imposition of the State's cigarette tax upon sales by reservation Indians to non-Indians. After noting that imposition of the tax upon sales involving only reservation Indians would likely be barred by *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), the Court stated:

> "The tax here sought to be imposed upon Mr. Tonasket's cigarette sales to non-Indians is, among other things, one levied upon the 'use' and 'consumption' of the cigarettes. By Laws of 1972, 1st Ex.Sess., ch. 157, § 4, the legislature amended RCW 82.24.080, by proclaiming it to be also the intent of the chapter that the cigarette tax be imposed at the time and place of the first taxable event. If this legislative declaration be an expression of what the legislature always intended with respect to RCW 82.24.080, then, since Mr. Tonasket was purchasing cigarettes from an Oregon distributor for resale to reservation Indians as well as to non-Indians, *it would appear logical to conclude that the first taxable event would be the resale of the cigarettes to a non-Indian*, at which time Mr. Tonasket could be required to affix the tax stamp and collect the amount of the tax from a non-Indian customer." 525 P.2d at 754. (Emphasis added).

Although the language is somewhat unclear since the Court denominated the taxable event as the resale of the cigarettes, given the focus of the Court on the statute's alternative applicability to use or consumption and the commonly imposed requirement that use taxes be collected by retailers, it seems safe to conclude that the Court meant that the use or consumption was the taxable event and thus recognized that the legal incidence of the tax could shift depending on the circumstances of the transaction.

Finally, the legislature itself gave a strong indication that it interpreted the legal incidence of the tax as falling



upon the non-Indian purchaser in transactions involving on-reservation sales to non-Indians in 1975 amendment to the cigarette tax Act. As amended in 1975, R.C.W. 82.24.260 provides in part:

> "Any retailer who sells or otherwise disposes of any unstamped cigarettes other than * * * a federally recognized Indian tribal organization with respect to sales to enrolled members of the tribe *shall collect from the buyer or transferee thereof the tax imposed on such buyer or transferee by RCW 82.24.020* * * * and remit the same to the department * * * *" (Emphasis added).

In sum, this Court concludes the statute evidences the legislature's intent to impose the legal incidence of the tax at the earliest constitutional opportunity. Where on-reservation tribal sales to non-Indians are involved, the first taxable event is, therefore, the use or consumption by the non-Indian purchaser. In such situations, the legal incidence falls upon the non-Indian purchaser rather than the tribal seller.[15]

Having concluded that insofar as on reservation sales to non-Indians are concerned, the State imposes a tax upon the use or consumption of cigarettes by non-Indians,

[15]A similar conclusion cannot be reached with respect to State's tobacco products tax. R.C.W. 82.26. Although the parties have discussed the cigarette and tobacco products taxes as if they stand or fall together, the statutory language of the latter makes it clear that the legal incidence of the tax falls upon the Dealer. Actually State imposes two taxes upon specified tobacco products other than cigarettes. "A floor stocks tax is * * * imposed upon every distributor of tobacco products" by R.C.W. 82.26.020(2). The Dealers are clearly distributors within the terms of the statute since distributor is defined to include "any person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from without the state any tobacco products for sale." R.C.W. 82.26.010(3). The second tax is "upon the sale, use, consumption, handling, or distribution of all tobacco products" in Washington. R.C.W. 82.26.020(1). Unlike the cigarette tax, there is no statutory language imposing the tax upon the first taxable event. Rather the tax is imposed when "the distributor (a) brings, or causes to be brought, into this state from without the state tobacco products for sale." R.C.W. 82.26.020(1). Thus, in both instances the legal incidence falls upon the Dealer and the tax is invalid.

the legal incidence of which falls upon them, we turn to a consideration of the Tribes' other contentions.

The first alternative claim raised against the validity of the tax by the Tribes is that is violative of the Indian Commerce Clause because it imposes a multiple tax burden on Indian commerce which is not shared by non-Indian commerce.[16] In order to establish this proposition, the Tribes rely by analogy on decisions of the Supreme Court construing the scope and effect of the Commerce Clause as it has been applied to interstate as opposed to Indian commerce. The Tribes argue that the rationale of such cases is applicable since "[i]t is no more permissible for a state to discriminate against Indian commerce than it is to discriminate against interstate commerce."

A full review of these contentions is, however, unnecessary. The simple answer is that such claims have been prohibited by the Supreme Court. The cases on which the Tribes rely for support have established a doctrine of "constitutional law" based upon a construction of the scope and effect of the Commerce Clause in the absence of controlling federal statutes. *E.g., Freeman v. Hewit*, 329 U.S. 249, 252 (1946); *Southern Pac. Co. v.*

[16]This Court is mindful of the Ninth Circuit's recent decision in *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). In *Fort Mojave*, both the county government and the tribe imposed a tax on the non-Indian lessee of Indian property on the reservation. Nevertheless, without citation of authority, the Court held that there was no impermissible double taxation because the taxes were "imposed by two different and distinct taxing authorities." *Id.* at 1258. This, of course, does not resolve the issue but merely restates the question. In every case in which the Supreme Court has struck down state taxes as being violative of the Commerce Clause due to double taxation, more than one taxing authority has been actually or potentially involved. However, in view of our disposition of this issue, there is no need to consider whether this Court, as a three-judge District Court, is bound by the law of the Circuit in which it sits. *Compare Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488, 504-05 (W.D. Wash. 1967), *aff'd.* 390 U.S. 598 (1968), with *Athanson v. Grasso*, 411 F. Supp. 1153, 1157 (D. Conn. 1976), and *Alabama NAACP State Conference of Branches v. Wallace*, 269 F. Supp.346, 350 (M.D. Ala. 1967).



*Arizona*, 325 U.S. 761, 769-70 (1945); *Gwin, White & Prince v. Henneford*, 305 U.S. 434, 438 (1939). *See Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Monamotor Oil Co. v. Johnson*, 292 U.S. 86 (1934).

In *Moe*, 425 U.S. at 481 n.17, the Court made it clear that after *Mescalero* and *McClanahan*, state tax statutes which affect Indian tribes and Indians will not be invalidated as a result of "any automatic exemptions 'as a matter of constitutional law' either under the Commerce Clause or the intergovernmental-immunity doctrine * * * *" It is true nevertheless that the Court has established the general rule that a state may not tax Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation absent congressional consent, *Mescalero* and *McClanahan*.[17] Outside the "special area of state taxation"[18] the Tribes have the burden of establishing that a challenged state regulation "frustrates tribal self-government, *see Williams v. Lee*, 358 U.S. 217, 219-220 (1959), or runs afoul of any congressional enactment dealing with the affairs of reservation Indians, *United States v. McGowan*, 302 U.S. 535, 539 (1938) * * * *" *Moe*, 425 U.S. at 483.

The State implements its cigarette tax by imposing the burden of collecting it upon the Dealers. The Tribes, continuing their reliance on the analogy to cases interpreting the Interstate Commerce Clause, urge that the imposition of the collection requirement upon the Dealers is violative of the Due Process Clause.[19]

[17]Even this general rule was established as the result of the conclusion that state taxation was preempted after considering the relevant federal treaties and statutes rather than as an automatic rule of constitutional law based upon the construction of a particular section of the Constitution.

[18]Since the legal incidence tax involved here falls upon the non-Indian purchaser of cigarettes rather than the Tribes, this case falls outside the special area of state taxation to which the aforementioned general rule is applicable. *Moe*, 425 U.S. at 483.

[19]In asserting this claim, the Tribes neither attack the validity of the tax nor do they rely directly on the unadorned force of the

The short answer to these contentions is that the Supreme Court expressly approved such a collection requirement in *Moe*.

> "We therefore agree with the District Court that to the extent that the 'smoke shops' sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof." 425 U.S. at 483.

We are unpersuaded by the Tribes' effort to distinguish *Moe* in this regard by claiming that unlike in *Moe*, there is here an absence of the required nexus between Dealer, upon whom the collection requirement is imposed, and the taxing jurisdiction. They suggest that the nexus in *Moe* was supplied by the Indian retailer's purchase of his cigarette inventory from a Montana wholesaler. In contrast, they point out that here the Dealers neither purchase their inventories from an in-state wholesaler nor do they maintain any offices or send any agent off the reservation to solicit sales. Consequently, they argue there is no nexus with the State sufficient to support a collection requirement.

In interstate commerce cases, it has long been recognized that "[s]tates necessarily impose the burden of collecting the [use] tax on the out-of-state seller; the impracticability of its collection from the multitude of individual purchasers is obvious. * * * However, not every out-of-state seller may constitutionally be made liable for payment of the use tax on merchandise sold to purchasers in the State." *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 555 (1977). Principles of due process require that in order for a collection requirement to be valid, the out-of-state seller must have some nexus to the taxing state; the "simple but controlling question is whether the state has given

Commerce Clause itself. Accordingly consideration of this claim is not prohibited by the language in note 17 of *Moe*.



anything for which it can ask return." *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940).

This test is satisfied if the person on whom the collection duty is imposed has "some definite link" or "minimum connection" with the taxing jurisdiction. *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753, 756 (1967); *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954). This link is sufficient if the seller receives any services from the taxing state, and it is irrelevant that the services received are unrelated to the activity of the seller which gave rise to the collection duty. *National Geographic*, 430 U.S. at 560-61.

Thus, it is apparent that the Tribes read *Moe* much too narrowly. In *Moe*, the Court neither mentioned the nexus requirement nor did it give any special significance to the fact that the Indian retailer secured his inventory from an in-state wholesaler. This was undoubtedly because of the substantial presence of the Indian retailer in the state. After all, the reservation exists within the territorial boundaries of State. Indians are citizens of the State and are entitled to and do receive services from it. Although this is not sufficient to justify direct state taxation of Indians or Indian tribes in the face of conflicting treaties and/or federal statutes, it clearly constitutes a sufficient link so that the mere imposition of a collection requirement does not violate due process.

The Tribes next argue that the State's cigarette tax has been preempted by the Indian Traders Act, 25 U.S.C. § 261, *et seq.*; by federal policy underlying the Indian Reorganization Act of 1934, 25 U.S.C. § 476, *et seq.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450, *et seq.*, and the Indian Financing Act of 1974, 25 U.S.C. § 1451, *et seq.*; and, finally, by tribal ordinances establishing a comprehensive regulatory and taxing scheme for transactions involving on-reservation sales by Indian retailers to Indians and non-Indians.

It is well established that when Congress passes legislation in implementation of one of its enumerated

powers, it may be so pervasive as to preclude any state regulation in the same field. *Warren*; *Hines v. Davidowitz*, 312 U.S. 52 (1941). This may be true even though the state regulation is consistent with and merely seems to supplement a less pervasive federal regulatory scheme. *Campbell v. Hussey*, 368 U.S. 297 (1961); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). One test which has been frequently cited by the Court was first promulgated in *Hines*, 312 U.S. at 67:

> "This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. * * * In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether [a challenged statute] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

The preemptive scope of Indian Traders Act was first considered by the Supreme Court in *Warren* wherein an Arizona statute which imposed a tax upon the income of a federally licensed Indian trader derived from the on-reservation sale of goods to Indians was struck down. Noting the long history of comprehensive federal regulation of Indian traders, the Court found

> "the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Act of Congress or by valid regulations promulgated under those Acts." 380 U.S. at 691.

Consistent with the principles of federal preemption, the Court struck down the tax. To do otherwise, would have

> "put financial burdens on [the trader] or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." *Id.*



More recently the Court had occasion to mark the limit of the preemptive scope of the Indian Traders Act. The congressional objective of insulating Indian traders from state regulation in their dealings with Indians was emphasized in *Moe* as the Court, distinguishing *Warren*, rejected an argument similar to that made by the Tribes here. The fact that Montana placed its cigarette tax on the non-Indian consumer rather than the Indian trader as in *Warren* was held to impose no burden on the trader sufficient to trigger preemption by the Indian Traders Act.

*Moe*, however, does not dispose of the Tribes' further argument that *Warren* requires the conclusion that the reporting aspects of State's collection requirement have been preempted. In *Moe*, although the Court approved the requirement that the Indian trader add the tax to the sales price, it expressly reserved judgment on whether the state could lawfully impose additional burdens on the trader. 425 U.S. at 468 n.6.

To the extent a limited collection burden was approved by the Court in *Moe*, it related to the trader's transactions with non-Indians rather than Indians. Thus, the Court's holding in *Warren* that the Indian Traders Act left no room for state regulations burdening Indian traders as a result of their on-reservation transactions with Indians was left intact.

In this case, the requirements imposed by the State, as set forth in E.T.B. 504.08.192, go beyond requiring the trader to collect the tax on sales to non-Indians. Although recognizing that sales to Indians may not be made subject to the tax, the State requires the Dealers to "demonstrate entitlement to make such sales without collection of tax" by keeping detailed records of sales to Indians. Dealers are required to record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations to which or within which sales are made, and the dollar amounts and dates of sales. In addition, unless the Indian purchaser is personally known to the Dealer, he must require presentment of a tribal

identification card issued by the member's tribe. This constitutes a burden on the Dealer which relates to his transactions with Indians. Further, State makes no provision for compensating him for the burden imposed. Even if his sales to non-Indians declined or were purposely discontinued, the burden would continue undiminished. In fact, the only way a Dealer could avoid the record keeping requirement would be to cease doing business with Indians as well as with non-Indians. Since State has pointed to no "Acts of Congress or valid regulations promulgated under those Acts" (*Warren*, 380 U.S. at 691) which authorize such, the record keeping requirements are invalid.

The Tribes next urge that even if the Court finds that the State's cigarette tax has not been preempted by the Indian Traders Act, it has been preempted by "well established federal policy * * * encouraging Indian self-government and economic development" underlying the Indian Reorganization Act, Indian Self-Determination Act, and the Indian Financing Act. We disagree.

The statutes relied upon by the Tribes do establish a general federal policy favoring Indian self-government and economic development. The Indian Reorganization Act, for example, was passed by Congress to encourage tribes to revitalize their self-government by adopting constitutions and bylaws and creating chartered corporations, with power to conduct business and economic affairs. *Mescalero*, 411 U.S. at 151. In *Bryan*, 426 U.S. at 389 n.14, the Supreme Court, citing the Indian Self-Determination Act and the Indian Financing Act, noted that federal policy was "returning to a focus upon strengthening tribal self-government." *See also Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975). However, the Supreme Court has never suggested that any of these statutes has of its own force established a policy of implied tax immunity for Indian tribes or those dealing with Indian tribes. In fact, in *Mescalero* the Court held that the Indian Reorganization Act did not create a tax immunity



for income earned by a tribally run corporation from its off-reservation activities.

Nothwithstanding the existence of such a general federal policy, a review of the cases cited by the Tribes and uncovered by our own research reveals that in order to determine whether state legislation "stands as an obstacle to the accomplishment" of some federal purpose, it must be compared to a federal enactment on the same subject. That is, the threshold test is whether the state and federal governments have attempted to regulate the same subject matter. *See, e.g., City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973), (regulation of airport noise levels); *Florida Lime & Avocado Growers* (maturity of avocados for marketing); *Campbell* (labeling of tobacco for marketing); *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954), (licensing of common carrier); *California v. Zook*, 336 U.S. 725 (1949), (sale or arrangement of transportation on a public highway); *Rice* (regulation of rates charged by warehouse operators); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942), (production standards for renovated butter); and *Hines* (registration of aliens as a distinct group).

The difficulty for the Tribes is that they can point to no provision in any of the cited Acts which attempts to implement the federal policy favoring Indian self-government and economic development by regulating subject matter closely related to that touched on by the State's cigarette tax. The necessity of such a showing to establish preemption is further buttressed by the Supreme Court's analysis in *Fisher v. District Court*, 424 U.S. 382 (1976). In *Fisher*, the Court held that a Montana statute regulating adoption of Indian children on the Northern Cheyenne Indian Reservation was preempted by the passage of a tribal ordinance covering the same subject matter. While the Court expressly acknowledged the federal policy underlying the passage of the Indian Reorganization Act, it did not rely on the force of that general policy standing alone to invalidate the statute.

Rather, the decision that the state statute had been preempted turned on the implementation of the underlying federal policy through the passage of the tribal adoption ordinance.

> "In 1935, the [Northern Cheyenne] Tribe adopted a constitution and bylaws pursuant to § 16 of the Indian Reorganization Act, * * * a statute specifically designed to encourage Indian tribes to revitalize their self-government. *Mescalero Apache Tribe, supra*, at 151. Acting pursuant to the constitution and bylaws, the Tribal Council * * * established the Tribal Court and granted it jurisdiction over adoptions. * * *" *Id.* at 387.
>
> "The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by § 16 of the Indian Reorganization Act, 25 U.S.C. § 476. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians. Accordingly, * * * that jurisdiction has now been pre-empted." *Id.* at 390.

Thus, absent some legislation touching upon the subject matter regulated by the State, the federal policy underlying the Acts relied on by the Tribes does not preempt the State's cigarette taxing scheme.

We now come to the Tribes' contention that the State's scheme has been preempted by the passage of tribal cigarette ordinances.

It is clear that Congress may validly delegate legislative authority to an Indian tribe even if the exercise of that authority involves control over the conduct of non-Indians. *United States v. Mazurie*, 419 U.S. 544 (1975). In addition, it is clear that where an Indian tribe exercises delegated authority in the implementation of federal policy and the result is a tribal ordinance which conflicts with an otherwise valid state statute, the state statute is preempted. *Fisher*. Although *Fisher* involved a statute which affected only Indians, there is no reason to believe that preemption would be precluded merely because the state and tribal enactments also affected



non-Indians on tribal lands and as much has been recognized by other federal courts. In *Confederated Tribes of the Colville Indian Reservation v. Washington*, 412 F. Supp. 651 (E.D. Wash. 1976), the District Court held that a state statute requiring non-Indians to purchase state fishing licenses prior to fishing on the Colville Indian Reservation was preempted by the enactment of a tribal ordinance, pursuant to federally delegated power, which established "a comprehensive program for the administration of tribal fisheries resources" and which, in part, required non-Indians to purchase fishing licenses from the tribe. To the same effect is *Eastern Band of Cherokee Indians v. North Carolina*, No. BC-C-76-65 (W.D. N.C. August 27, 1976).[20]

The questions remain then whether there has been a delegation of legislative authority to the Tribes and, if so, whether there has been a preemption.

In 1936, the Makah Tribe adopted a constitution and bylaws pursuant to the Indian Reorganization Act, and the passage of its cigarette ordinance was an exercise of governmental power authorized by § 16 of the Act, 25 U.S.C. § 476. This clearly constitutes the exercise of congressionally delegated power. *Fisher*.

The Colville and Lummi Tribes, however, voted in 1935 not to come under the Indian Reorganization Act. Nevertheless we conclude they were exercising congressionally delegated power in passing their cigarette

[20] *People of State of California v. Quechan Tribe of Indians*, 424 F. Supp. 969 (S.D. Cal. 1977), is not to the contrary. It is true that the Court in *Quechan Tribe of Indians* rejected an argument that the mere existence of a tribal ordinance requiring non-Indians to purchase tribal fishing licenses preempted a state statute regulating on-reservation hunting and fishing by non-Indians. However, there was no indication the tribal ordinance established a comprehensive scheme regulating on-reservation hunting and fishing. Moreover, there was no interference with the objectives of the tribal ordinance since the Court found that notwithstanding the state regulation, "[t]he same revenues as have been historically available to the Tribe from the sale of permits will continue to be available if California is allowed to apply its fish and game laws." *Id.* at 976.

ordinances. Their constitution and bylaws were ratified by a majority of the members, approved by the Secretary of Interior and any amendment is subject to the provisions of 25 C.F.R. 53.1 — the same conditions which are imposed on tribes organizing under the Indian Reorganization Act. Federal programs designed to encourage tribal self-government and economic development are uniformly made available to all federally recognized tribes not just those which are organized under the Indian Reorganization Act. See *e.g.*, § 3 of the Indian Financing Act, 25 U.S.C. § 1452, and § 4 of the Indian Self Determination Act, 25 U.S.C. § 450(b).

Of primary significance is the fact that the governmental powers delegated under § 16 of the Indian Reorganization Act were in large part those "powers vested in any Indian tribe or tribal council by existing law." The power to tax both Indians and non-Indians was one of those powers. *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956). See Cohen, Handbook of Federal Indian Law at 142 (1942). Under these circumstances, particularly when it is recalled that notwithstanding their treaty rights, tribal governments are subject to the plenary power of Congress and so retain only those powers which Congress allows them to retain (*Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)), it is accurate to describe the Tribes as exercising congressionally delegated power.

Once it has been determined that the Tribes in passing their cigarette ordinances were exercising federally delegated power, it is clear that the application of the State's cigarette tax to non-Indians purchasing cigarettes from Indian retailers on the reservation has been preempted. There is no question but that the tribal taxing ordinances regulate the same subject matter as does the state taxing statute. It is equally clear that the State's statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67.



As the nature and scope of the tribal regulatory and taxing scheme has been outlined above, it is necessary only to observe that the Tribes established their cigarette ordinances to accomplish two primary objectives: the regulation of conditions under which cigarettes could be sold to Indians and non-Indians on the reservation, and to generate revenue for essential tribal governmental programs. The revenue generated by the taxes to date has been devoted to the partial funding of programs such as day care, education, nutrition, fire protection and alcoholism of reservation people. The bulk of the revenue derived from the tribal taxes comes from sales to non-Indians. The impact of imposing the State's cigarette tax in addition to the tribal tax will not only eliminate the Tribes' competitive advantage but it will give off-reservation retailers a substantial price advantage. Thus, it is not hard to understand why the State conceded that:

> "Assuming that the court finds that the State could require the Tribe and/or its licensed retailers to add the State tax to the sale price of cigarettes sold to non-Indians, *it is painfully apparent that very few, if any, cartons of cigarettes would have been sold.*" (Emphasis added.)

Under such circumstances, the objectives of Congress in making the delegation of power and of the Tribes in passing the taxation ordinances for tribal usage would obviously be frustrated. Therefore, the application of the State's tax has been preempted.

In its brief and at final argument, the State urged that to find its cigarette tax invalid would wreak financial disaster upon it as the Tribes would be free to create unlimited tax havens for non-Indians on their reservations. This scenario is unlikely to occur for several reasons. First, there is no preemption absent tribal taxation, and to the extent the Tribes impose their tax, there is no tax haven. Second, to the extent the Tribes are able to generate revenue for needed services, the corresponding burden on the State to supply services may be reduced. Third, the evidence indicates that the Tribes have shown

considerable self-restraint in this area and there is no reason to assume they will not continue to do so. For example, there is no evidence that the Tribes have sought to tax non-Indians and thus preempt the State's power to tax in any area other than the sale of cigarettes. Even with regard to the sale of cigarettes, each of the Tribes currently limits sales to non-Indians by its Dealers to three cartons per sale. Accordingly, non-Indians must continue to buy the bulk of their cigarettes from non-Indian retailers and those sales are subject to the State's taxes. Fourth, all ordinances are subject to the approval of the Secretary of Interior and he could be expected to act in the event of abuse. Fifth, and of singular importance is the plenary power of Congress. It could act at any time to limit or remove any of the legislative powers of the tribal governments.

As an alternate ground for relief, we hold that as applied to non-Indians as a result of their on-reservation purchases from Dealers, the State's cigarette taxing scheme constitutes an interference with tribal self-government.

In *Williams v. Lee*, 358 U.S. 217 (1959), the Supreme Court considered whether a non-Indian could sue an Indian in state court on a debt arising from a transaction on the reservations. *Williams* teaches that "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. Noting that the tribal court had broad civil jurisdiction which covered civil actions against Indians by outsiders, the Court held the state court to be without jurisdiction.

> "There can be no doubt that to allow the exercise of state jursidiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 223.



The continuing validity of the *Williams* self-government test has been assured by the Supreme Court. *McClanahan*, and *Fisher*.

In this case, both the State and the Tribes seek to tax non-Indians as a result of their on-reservation transactions with Dealers. The impact of superimposing the State's cigarette tax on the tribal taxes has already been discussed in this opinion. However, it bears repeating that at least with regard to a commodity as highly price elastic as cigarettes, the result will be the depletion of an already limited tribal tax base, probably destruction of the tribal enterprises and elimination of essential revenues needed for tribally sponsored programs.

While not really contesting the probable detriment to the Tribes, the State argues that since it imposes its tax on the non-Indian consumer, the economic impact on the Tribes is indirect and that no matter how deleterious such an impact is, it cannot be deemed an interference with tribal self-government. While this argument is not without force, we find it unpersuasive. The foundation of the State's contention is to be found in its statement that the Tribe's self-government claim "in reality boils down to a claim of intergovernmental immunity." Based on this analysis, they rely heavily on the line of cases beginning with *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938), which establishes the proposition that those dealing with the federal government are not free from state taxation merely because the economic impact of the state tax may be passed on to the federal government. (The same analysis, of course, applies where the federal government seeks to tax those who deal with state governments).

Prior to *Mountain Producers*, with limited exceptions such as *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), court decisions had marked a course of ever widening tax immunity for those dealing with state or

federal governments under application of the doctrine of intergovernmental tax immunity. However, that course was reversed in *Mountain Producers. Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 364-65 (1949). The trend toward limiting the reach of inter-governmental immunity was continued in cases such as *King & Boozer, Oklahoma Tax Comm'n*; and *United States v. City of Detroit*, 355 U.S. 466 (1958).

In *Mountain Producers*, the Supreme Court declared the principle

> "that the power to tax should not be crippled 'by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality *and there is only remote, if any, influence upon the exercise of the functions of government.' Willcuts v. Bunn*, 282 U.S. 216, 225, and illustrations there cited." 303 U.S. at 385. (Emphasis added).

The Court was led to the declaration of this guiding principle because courts had been granting broad private tax exemptions based on " 'merely theoretical conceptions of interference with the functions of government' " which were "unjustified by actual interfering or destructive effects upon the performance of obligations to or work for the government, state or national." *Oklahoma Tax Comm'n*, 336 U.S. at 363-64. Examples of this problem were cited by the Court. *Id.* at 363 n.36.

This Court recognizes and the Tribes concede that any application of the doctrine of intergovernmental tax immunity to Indian Tribes was severely limited in *Mescalero. See also Moe*, 425 U.S. at 481 n.17. However, it is equally clear that the limitation on state power established in *Williams* continues unabated. Nevertheless it would be a mistake for the courts to set the same course in applying the *Williams* tribal self-government test as that which prompted the Supreme Court's decision in *Mountain Producers* with respect to the intergovernmental immunity doctrine. This does not mean as the State



contends that any state regulation of non-Indians as a result of their on-reservation transactions with Indians will, in the absence of the controlling federal statute, be valid if it results only in an indirect impact on a tribe. Rather, what the courts must avoid is utilizing the *Williams* test to strike down such state regulation based on "merely theoretical conceptions of interference with the functions of [tribal] government." In other words, if a tribe has proved and/or a state concedes that the state regulation causes an actual interference with the performance of the governmental obligations, the courts must, consistent with *Williams*, strike the regulation down.

It is our belief that it was this type of reasoning which the Supreme Court had in mind when in clarifying the *Williams* test, Justice Marshall, writing for the Court in *McClanahan*, stated that the *Williams* test has been applied "principally [to] situations involving non-Indians. * * * In these situations, both the tribe and the State could fairly claim an interest in asserting respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." *Id.* at 179.

When viewed with the above principle in mind, our conclusion in this case that the State's tax must be struck down as interfering with tribal self-government is not inconsistent with the Supreme Court's decision in *Moe* or those of the Ninth Circuit in *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); and *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972). In *Moe*, the cigarettes at issue were sold by individual Indians operating businesses and not by tribal enterprises. There was no indication that the sales of cigarettes were tribally financed, managed or regulated. Although the tribe apparently charged an administrative fee, no tribal tax was imposed on the cigarettes sold in the smoke shops, and the

tribe itself received no direct benefits from the cigarette sales upon which it depended as a source of revenue for tribal programs. Thus, in the absence of any direct involvement by the tribe, the Court concluded there was no interference with tribal self-government.

In *Agua Caliente*, the Court of Appeals upheld the imposition of the California Possessory Interest Tax on non-Indian lessees of Indian land. Although the Court granted relief on principles of intergovernmental immunity as applied in *United States v. City of Detroit* rather than the *Williams* test, the result is still largely explainable on the same basis as is *Moe*. The land involved consisted of 1,250 acres which had been leased to non-Indians with the approval of the Secretary of Interior. All but eight acres (99.3%) were leased by individual Indian allottees without tribal involvement. Therefore, as in *Moe*, absent tribal involvement, an indirect economic impact on individual Indians was not sufficient to constitute an interference with tribal self-government. There was, however, tribal involvement with the remaining eight acres (0.7%) as to which the possessory interest tax was also upheld. However, the opinion gives no indication that the economic impact of the possessory interest tax would have destroyed the leasehold value of the tribe's land or that any reduction in income to the tribe as a result of the state's tax would have deprived the tribe of revenues essential for its governmental programs. In addition, there was no comprehensive tribal regulatory and taxing scheme which would have been thwarted.

In *Fort Mojave*, the Court of Appeals reaffirmed the result in *Agua Caliente* while applying the *Williams* test on facts which were superficially similar to those in this case. The Court upheld the imposition of a possessory interest tax on non-Indian lessees of Indian land in spite of the fact that the tribe had also imposed its own tax on the lessees. However, the crucial factual difference between *Fort Mojave* and the instant case is that in *Fort Mojave* the Court was unable to determine the degree to



which, if any, the economic burden of the state's tax would have fallen on the tribe. On such facts, the Court was compelled to "hold that the uncertain economic burden here imposed on the tribe's ability to levy a tax does not interfere with their right of self-government." 543 F.2d at 1258. To have done otherwise would have been to disregard the Supreme Court's admonitions that a state's taxing power should not be restricted on " 'merely theoretical conceptions of interference with the functions of government.' " *Oklahoma Tax Comm'n*, 336 U.S. at 363. In contrast, a restriction of the State's taxing power in this case is justified by proof of an actual interference with, if not destruction of, the Tribes' ability to carry out their tax financed self-governing functions. Therefore, we reject the State's contention that *Fort Mojave* controls the result here.[21]

(2) **Motor Vehicle, Mobile Home, Camper and Travel Trailer Excise Taxes:**

In addition to their attacks on the State's cigarette taxing scheme, the Tribes contest the application of the State's excise taxation of motor vehicles, R.C.W. 82.44, and mobile homes, campers and travel trailers, R.C.W. 82.50, owned by the Tribes or their enrolled members.[22]

[21]In view of our conclusion that the State's cigarette taxing scheme may not be validly applied to sales to non-Indians under the circumstances here present, any steps taken by the State to enforce the tax were also unlawful. Hence, it is not necessary and we do not reach the merits of the Tribes' additional claim that the enforcement measures undertaken by the State are violative of federal law and/or the Constitution of the United States independently of whether the tax itself is valid. For the same reason, it is not necessary and we do not reach the merits of the Tribes' claim that even if the tax may be applied to non-Indians, it may not also be validly applied to Indians who, though living on the reservation, were not enrolled members of the respective Tribes. However, the latter issue was resolved adversely to the State in No. 3909.

[22]The State argues that 28 U.S.C. § 1341 bars this Court from considering these claims to the extent they are asserted on behalf of individual members of the Tribes. After *Moe*, it is clear that an Indian tribe has standing to assert the claims of its members with respect to the validity of state tax laws and that § 1341 does not bar the assertion of such claims by a tribe.

Although the motor vehicle and mobile home, camper and travel trailer taxes differ slightly, the State acknowledges they are "in practical operation and effect virtually the same." Each tax is denominated under the applicable statute as an excise tax imposed and assessed annually upon a specified percentage of the fair market value of the vehicle for the privilege of using the vehicle within the state of Washington.

The issue presented has been narrowed by the State's concession that after *McClanahan, Moe,* and *Bryan,* it may not tax mobile homes or vehicles owned by the Tribes or their members which are used exclusively on the reservations. Counsel for the State further assures the Court that it has not only ceased to impose taxes in such situations, but stands ready, willing and able to make refunds on proof of entitlement for such taxes previously imposed. However, the State, relying on *Mescalero,* contends that *McClanahan* and *Moe* are not controlling to the extent the challenged taxes are imposed for off-reservation use. Under the existing scheme, off-reservation use is presumed (except, apparently, as to mobile homes), and since the amount of tax payable is the same regardless of the extent of vehicle use, the State requires payment of the tax as a condition precedent to the licensing of the vehicle.

Although there is no doubt that *Mescalero* would control if this issue involved use exclusively off the reservation, we do not agree that *Moe* is not controlling on the facts presented here. A review of the District Court's decision in *Moe* reveals that the vehicle use there taxed was partly on and partly off the Flathead Reservation. *Confederated Salish & Kootenai Tribes v. Montana,* 392 F. Supp. 1325, 1328-29 (D. Mont. 1975), *aff'd,* 425 U.S. 463 (1976), (Smith, J., concurring and dissenting). Moreover, the Montana tax invalidated in *Moe* was, except for labeling, identical in operation and effect to the tax here imposed.



Rather than disputing the practical similarity between the tax invalidated in *Moe* and that imposed here, the State seeks to distinguish *Moe* on the ground that the tax imposed by Montana was denominated a "personal property tax" while the State's is labeled an "excise" or privilege tax. To be sure, the Supreme Court, at least in governmental immunity cases, has sometimes placed great store in the conceptual differences between property and use or privilege taxes. *E.g., United States v. City of Detroit.* Nevertheless the Supreme Court has also expressed its willingness to disregard labels in order to save a "property tax" if the tax was otherwise valid when viewed solely with regard to its "practical operation." *E.g., City of Detroit v. Murray Corp.,* 355 U.S. 489 (1958), and cases cited. *Cf. Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977). Since the Court eschewed this approach in *Moe,* we can only conclude that it found the tax improper in its practical operation. Inasmuch as there is no difference in practical operation between the two schemes, we hold that the State's motor vehicle and mobile home, camper and travel trailer excise taxes are invalid as applied to reservation situs vehicles which are owned by the Tribes and/or their reservation resident members even though they are used, in part, off the reservation.

**(3) The State's Assumption of Indian Reservation Jurisdiction:**

The Tribes challenge the State's assumption of Indian jurisdiction pursuant to R.C.W. 37.12 as being violative of federal law and the Constitution of the United States. First, they argue that it violates the terms of congressional consent contained in Pub. L. No. 280 because the State was required and failed to remove a disclaimer of Indian jurisdiction in its constitution, and because partial assumptions of jurisdiction were prohibited. This claim is without merit. The disclaimer issue was presented to the Supreme Court on appeal from an

adverse decision in *Makah Indian Tribe v. State*, 76 Wash. 2d 485, 457 P.2d 590 (1969), *appeal dismissed*, 397 U.S. 316 (1970). The Supreme Court's dismissal of the appeal as not presenting a substantial federal question is binding on this Court. *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975). And it is now also settled that Pub. L. No. 280 does not prohibit partial assumptions of jurisdiction. *Yakima 1*.

Second, the Tribes urge that partial assumption within reservations violates the Equal Protection Clause of the Fourteenth Amendment. In *Yakima 2*, the Court of Appeals held that the State's assumption of partial territorial jurisdiction over the Yakima Reservation pursuant to R.C.W. 37.12.010 violated the Equal Protection Clause because the distinctions in the statute between trust and nontrust land bore no rational relationship to the statute's purpose of providing law enforcement on the reservation. The entire section of the statute was struck down because the Court found the objectionable portions could not be severed from the remainder. This decision is dispositive of the claims of the Makah and Lummi Tribes because the pattern of jurisdiction on their reservations is based on R.C.W. 37.12.010 and is identical to that on the Yakima Reservation.

However, the pattern of jurisdiction asserted over the Colville Reservation differs from that asserted over the Makah and Lummi Reservations. Acting pursuant to R.C.W. 37.12.021 which expressly requires the consent of the Tribe, the State assumed "total" jurisdiction over the Colville Reservation. It is argued that such action constitutes a denial of equal protection because the abuses inherent in the partial assumption of jurisdiction within a reservation are also present where a state accepts total jurisdiction over some but not all reservations. A review of the discussions in *Yakima 1 and 2* establishes that this argument is without merit.

Alternatively, it is argued that R.C.W. 37.12.021 must be struck down because it is not severable from R.C.W.



37.12.010. This claim is also without merit. Basically, the remaining provisions of an Act may stand in spite of the unconstitutionality of another portion absent some indication that the legislature would have not enacted them alone and if the remaining provisions can operate independently of the unconstitutional portion. *United States v. Jackson*, 390 U.S. 570, 585 (1968); *State v. Anderson*, 81 Wash. 2d 234, 236 (1972), 501 P.2d 184, 185-86 (1972). In *Yakima 2*, the Court of Appeals found that the invalidation of one aspect of partial jurisdiction would have complicated the enforcement of other aspects. Thus, the Court held the remaining provisions not to be severable and struck R.C.W. 37.12.010 down in its entirety. However, the inability of the State to enforce partial jurisdiction of R.C.W. 37.12.010 as to nonconsenting tribes in no way inhibits its ability to enforce the full jurisdiction assumed as to consenting tribes under R.C.W. 37.12.021. Further, there is no substantial reason to assume that the legislature would have refused to enact legislation obligating it to assume full jurisdiction over consenting tribes merely because it was unable to constitutionally assert partial jurisdiction over tribes withholding their consent to full jurisdiction.

We finally conclude that judicial economy, convenience, and fairness demand that we retain jurisdiction of the Supremacy Clause issues presented by the Tribes for final adjudication and declare:

(1) The imposition of the State's cigarette taxing scheme under R.C.W. 82.24, the administrative regulations promulgated thereunder, and any enforcement thereof by seizure or otherwise against any of the Tribes or their respective retail dealers are unlawful in that the State's cigarette taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government;

(2) The imposition of the State's tobacco products taxing scheme under R.C.W. 82.26, the regulations promulgated thereunder, if any, and any enforcement

thereof as against any of the Tribes or their respective retail dealers are unlawful in that the legal incidence of the tax falls upon the Tribes or their respective retail dealers and results in a direct taxation of Indian income derived from on-reservation activities;

(3) The imposition of the State's motor vehicle excise tax under R.C.W. 82.44 and its mobile home, camper, and trailer excise tax under R.C.W. 82.50, the regulations promulgated thereunder, and any enforcement thereof as against any of the Tribes or reservation resident members are unlawful as an infringement of their rights secured under federal statutes and treaties; and

(4) The State's exercise of civil and criminal jurisdiction under R.C.W. 37.12, the regulations promulgated thereunder, and any enforcement thereof against the Lummi or Makah Tribes or any reservation resident members of either Tribe are unlawful as a denial of Equal Protection under the United States Constitution. However, exercise of similar jurisdiction over the Colville Tribe or any of its reservation resident members does not constitute a violation of the Equal Protection Clause.

Further, we conclude that the Tribes and their respective reservation resident members are entitled to permanent injunctive relief in enforcement of such declarations.

Neither party shall recover costs or attorney fees in these three-judge District Court proceedings.

We deem it expedient and in conservation of judicial time and effort that the issue of the Tribes' recovery of damages, costs and attorney fees therein, if any, resulting from such Supremacy Clause and Fourteenth Amendment infringements should be remanded to the single judge District Court for disposition under further order.

The temporary injunctive relief in favor of the Tribes heretofore issued herein is to remain in force and effect until entry of final judgment herein by this Court.

This decision shall constitute the findings of fact and



conclusions of law of this three-judge District Court as required by Fed. R. Civ. P. 52(a).

Counsel for the Tribes is requested to serve and submit within 30 days from the date hereof a proposed final declaratory judgment and decree of permanent restraint in accordance with the foregoing decision.

CAUSE NO. 3909

**PARTIES:**

The plaintiff is the United States of America for the benefit of the Confederated Tribes and Bands of the Yakima Indian Nation, and the members thereof (Tribe).

The Confederated Tribes and Bands of the Yakima Indian Nation (also Tribe) intervened as plaintiff under Fed. R. Civ. P. 24.[1]

The defendant is State of Washington (State).

**JURISDICTION:**

We note jurisdiction of these causes pursuant to 28 U.S.C. § 1345, 28 U.S.C. § 1362, 28 U.S.C. §§ 2201 and 2202, and 28 U.S.C. § 2281.[2]

**HISTORY OF PROCEEDINGS:**

This action was commenced by the filing of the complaint on July 18, 1973, and thereafter the Tribe's motion to intervene was granted. In all other major respects the procedural history parallels that in No. 3868.

**THE TRIBE'S CAUSE:**

The Tribe seeks declaratory relief with injunctive enforcement from the State's statutes and administrative regulations imposing taxes and collection procedures upon on-reservation sales to nonmembers to the Tribe by tribally licensed retailers (Dealers) of cigarettes (R.C.W. 82.24), tobacco products (R.C.W. 82.26), and general retail sales (R.C.W. 82.08). In addition, the Tribe seeks damage

[1]Neither the Government's nor the Yakima's standing to bring this cause is disputed.

[2]See note 1 in No. 3868.

against the State arising out of actions taken to enforce assessments of the challenged cigarette taxes.

**STATE'S DEFENSE:**

The State joins issue with the Tribe's claims.[3]

**FACTS:**

**A. Tribe:**

The Tribe is a United States Government recognized sovereign Indian tribe and operates under a governing body approved by the Secretary of Interior. The Yakima Indian Reservation was established by treaty ratified Mach 8, 1859, 12 Stat. 951, and encompasses approximately 1,390,000 acres in south central Washington. Of the reservation's population of 27,000 about 6,500 are Indians including 1,500 nonmembers of the Tribe.

**B. State's Taxing Schemes:**

**(1) Cigarette Tax:**

The basic aspects of the State's cigarette excise tax were discussed in No. 3868. Further, as in No. 3868, the Tribe has refused and continues to refuse to seek state authorization to possess unstamped cigarettes or to otherwise comply with the statute and regulations promulgated thereunder. Finally, the State has resorted to seizures of unstamped cigarettes in interstate commerce and bound for the Tribe's reservation to enforce assessments of its cigarette tax.

**(2) Sales Tax:**

The other tax which is also a primary subject of dispute in this cause is the State's retail sales tax (R.C.W. 82.08). Under this enactment, the State asserts the right to tax retail sales of goods (including cigarettes) and services

[3]The State does affirmatively seek relief in the form of a declaratory judgment against the Tribe. The Tribe contends that such a claim is improper in that it is immune from suit. Although the same issue was settled adversely to the State in No. 3868, all of the issues raised by the State herein may be reached by deciding the claims of the Tribe.



by the Tribe and/or its Dealers to nonmembers of the Tribe.

**C. Tribe's Business and Taxing Schemes:**

**(1) Cigarettes:**

In essential respects, the Tribe's cigarette and tobacco products retailing and taxation scheme is similar to those adopted by the tribes in No. 3868. The Tribe has passed ordinances providing for the taxation of on-reservation sales of cigarettes and tobacco products by Dealers.[4] These ordinances have been approved by the Secretary of Interior. Pursuant to its ordinances, the Tribe purchases cigarettes from wholesalers outside of Washington which it distributes to tribal members who have been licensed to run seventeen smoke shops on the reservation.

The Tribe derives revenue from the sale of cigarettes in two ways. First, it imposes a "markup" of one cent on each carton sold to its Dealers. A more significant source of revenue is the tax of 22.5 cents on each carton sold by the Dealers. The revenue generated by these sources is substantial; for example, in 1975, the Tribe derived more than $278,000 from them. These monies have been available to partially fund the Tribe's governmental programs for the educational, social, and economic advancement of its members.

As in No. 3868, the competitive advantage enjoyed by the Tribe due to its refusal to impose the State's cigarette tax has resulted in the majority of tribal cigarette sales being made to nonmembers of the Tribe. The stipulations of fact and testimony of Cyril Herrmann[5] establish that superimposing the State's cigarette tax of $1.60 per carton

[4]However, in contrast to No. 3868 there is no evidence in this cause that the Dealers are federally licensed Indian Traders.

[5]The deposition of Cyril Herrmann was taken by the Tribe and has been admitted into evidence. Herrmann received a Ph.D. in economics from Harvard University in 1953. He taught marketing at the Massachusetts Institute of Technology for six years and is presently Western Regional Vice-President of Arthur C. Little, Inc., a large diversified consulting and research company. Herrmann based his opinions on his education and experience in market analysis and upon

upon tribal sales would have the same impact as it would in No. 3868. That is, the tribal cigarette enterprises would be destroyed, thus eliminating a source of tax revenue upon which the Yakima Tribal Council relies for a substantial amount of its operating capital.

(2) **Other Businesses:**

The Tribe is also engaged in the operation of various noncigarette business enterprises.[6] Although the sales of these businesses are obviously not subject to the State's cigarette excise tax, the State does claim that sales to nonmembers of the Tribe are subject to its retail sales tax. The evidence does not afford a clear picture of what the impact would be of applying the State's retail sales tax to these businesses. The annual sales volume of these businesses is about $2,000,000. However, this figure includes the sales of the timber and land enterprises and those to tribal members which the State does not seek to tax. The stipulations of fact are unenlightening on this point. They merely show that the "sales [of these enterprises] are at economic value and if State excise taxes are paid on these sales it will reduce the income of the Yakima Tribe. * * *" The testimony of Herrmann, the Tribe's economic expert, is equally unavailing. With regard to the Tribe's noncigarette enterprises, he was questioned only as to the furniture manufacturing operation. And even there, his analysis of the impact of imposing the State's retail sales tax upon the furniture

the information he obtained from his visitation to and discussions at the Yakima reservation. His qualifications as an expert are not disputed by the State.

[6]Among the business enterprises owned and operated by the Tribe on the reservation, the sales of which the State claims are properly subject to its sales tax, are funriture, boat and housing unit component manufacturing, Indian arts and crafts, fish and food processing and newspaper distributing. The State does not now assert the authority to similarly tax the sales of the Tribe's land and timber enterprises. The Tribe also owns an aircraft sales, charter and service business which is operated as a corporation off the reservation. The Tribe does not dispute its liability for state taxes applicable to the operation of this business.



business was sketchy and not based on a review of the business records. Thus, it cannot be said with certainty that the Tribe could not offset an increase in costs from the application of the State's retail sales tax by somehow reducing production and/or marketing costs. Furthermore, even if the Tribe was unable to offset such cost increases, it is not clear that the economic viability of the furniture enterprise would be destroyed.

Finally, there is no evidence that the Tribe has adopted any ordinance regulating and taxing the non-cigarette business enterprises.

**DISCUSSION:**

The claims presented by the parties in this cause are at the same time more limited and more extensive than those presented in No. 3868. First, the Tribe does not attack the State's assumption of Indian jurisdiction, since they succcessfully litigated that issue in *Confederated Bands and Tribes of the Yakima Indian Nation v. Washington*, 552 F.2d 1332 (9th Cir. 1977). Neither does the Tribe present any challenge to the State's statutes providing for excise taxes on motor vehicles, campers, travel trailers and mobile homes, nor does it dispute the scope of this three-judge District Court's jurisdiction. Second, the contentions are more extensive in this action since, in addition to challenging the validity of the State's cigarette and tobacco products taxes as applied to on-reservation sales by Dealers to nonmembers of the Tribe, the Tribe also contests the validity of the State's retail sales tax as applied to the sales of the cigarette and other business enterprises operated by the Tribe on the reservation.

**CIGARETTE TAX ISSUES:**

Basically, the same arguments are raised both for and against the validity of the State's cigarette and tobacco products excise taxes as were raised in No. 3868. Since there are no essential factual differences between the

cases, the resolution of the cigarette and tobacco products tax claims in this cause is susceptible to the same analysis as was applied in No. 3868. We conclude that judicial economy, convenience, and fairness demand that we retain jurisdiction of the Supremacy Clause issues presented by the Tribe for final adjudication and declare, as we did in No. 3868:

(1) The imposition of the State's cigarette taxing scheme under R.C.W. 82.24, the administrative regulations promulgated thereunder, and any enforcement thereof by seizure or otherwise against the Tribe or its Dealers are unlawful in that the State's cigarette taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government; and

(2) The imposition of the State's tobacco products taxing scheme under R.C.W. 82.26, the regulations promulgated thereunder, if any, and any enforcement thereof against the Tribe or its Dealers are unlawful in that the legal incidence of the tax falls upon the Tribe or its Dealers and results in a direct taxation of Indian income derived from on-reservation activities.

**SALES TAX ISSUES:**

Although we were not directly faced with the validity of an application of the State's sales tax to on-reservation tribal sales in No. 3868, the principles of preemption and tribal self-government underlying the resolution of this question were discussed therein. Therefore, only an abbreviated discussion is necessary to explain the basis for our holdings below. In view of the underlying facts, the sales tax question is best discussed in two analytical segments: (A) As it applies to cigarette sales; and (B) As it applies to the on-reservation sales of goods and services of the Tribe's noncigarette businesses.

**A. Application to Cigarette Sales:**

The application of the State's sales tax to tribal cigarette sales would result in a price increase of about two



cents per package or roughly twenty cents per carton. Such an increase would, of course, decrease the differential between the price charged by tribal and that charged by nontribal retailers. Since cigarettes are highly price elastic, even a small change in price can cause a significant change in sales. However, even if compelled to add the State's sales tax, Dealers would still be left with a price advantage of approximately eight cents per package or eighty cents per carton.[7] Although we find that the application of the State's sales tax to tribal cigarette sales would cause a decrease in cigarette sales to non-Indians and thereby reduce tribal tax revenues, we cannot find that the decrease would be of sufficient magnitude to destroy cigarette sales as a source of tribal tax revenue and thereby work an actual interference with tribal self-government. Accordingly, we conclude and hold that such an application of the State's sales tax would not adversely affect tribal self-government.

This conclusion does not end the inquiry since the Tribe also contends that application of the State's sales tax to tribal cigarette sales has been preempted. The tribal ordinance placing a tax upon cigarettes sold by Dealers and the application of the State's sales tax to such cigarette sales clearly touch on the same subject matter. It is equally clear that the Tribe intended in enacting its cigarette taxing ordinance to maximize tribal tax revenue from the sale of cigarettes. Moreover, superimposing the State's sales tax on tribal cigarette sales would substantially decrease the Tribe's cigarette tax revenue. Thus, we find that such an application of the State's sales tax would frustrate the Tribe's objective in passing its ordinance and we hold and declare that the application of the State's sales tax to tribal cigarette sales to non-Indians has been

[7]Cigarettes sold by Dealers which are not subject to state taxes sell for about $3.95 per carton. The current rate of the State's sales tax is 5.1 percent of the retail sales price. In contrast, cigarettes sold by nontribal retailers to nonmembers of the Tribe sell for about $5.00 per carton. This price reflects $1.60 which is attributable to the State's cigarette excise tax and $0.24 which is attributable to its sales tax.

preempted and that any attempted enforcement thereof or regulations promulgated therender are unlawful.

B. **Application to Sales Attributable to the Tribe's Other Businesses:**

The Tribe also contends that the State may not apply its sales tax to sales made to non-Indians by the Tribe's noncigarette enterprises. However, this contention must be rejected since the Tribe has failed to carry its burden of proving either that such an application of the State's sales tax has been preempted or that it would interfere with tribal self-government. The absence of any tribal ordinance touching the same subject matter as does the challenged state statute precludes a conclusion that there has been a preemption. The tribal self-government argument must fail because the Tribe did not produce evidence that the application of the State's sales tax would destroy the revenue generating potential of its various businesses. The most that the evidence shows is that there would be some uncertain reduction in income to the Tribe. This is clearly insufficient to establish an interference with tribal self-government. *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

Having concluded that the State may properly apply its sales tax to on-reservation noncigarette business transactions involving non-Indians, we are faced with further disputes as to whom falls within the category of on-Indians and as to whether the State's sales tax enforcement scheme may be lawfully applied to tribal retailers.

While the State concedes that it may not lawfully apply its sales tax to members of the Tribe, it asserts that it may lawfully tax Indians who are not members of the Tribe. The State has sought to achieve this result by limiting the definition of the term "Indian" in Rule 192 to "persons duly registered on the tribal rolls of the Indian tribe occupying an Indian reservation." Thus, all non-



members of the Tribe are categorized as non-Indians and deemed subject to taxation. A similar contention was rejected by the District Court in *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1312 (D. Mont 1975), *aff'd*, 425 U.S. 463 (1976), and we agree with the view expressed there that all Indians residing on a reservation are equally free from the State's excise taxation regardless of whether they are members of the tribe.[8]

In addition to challenging the validity of the State's sales tax as applied, the Tribe contests the State's enforcement scheme. It argues that the State may not lawfully require the Tribe's noncigarette retailers to register with the Department of Revenue, collect and remit applicable taxes, or to keep records pertaining to taxable and nontaxable transactions.[9] This claim is based on the contention "that the State has no police power or regulatory power over the Yakima Nation and/or its retailers regarding these on reservation transactions." The Tribe further contends that the Supreme Court's decision in *Moe* is of no assistance in resolving this issue since "none of these burdensome duties were required of the Indian retailer [in *Moe*]."

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[8]The District Court in *Moe* noted that "different rules may apply 'where Indians have left the reservation and become assimilated into the general community.'" 392 F. Supp. at 1312 n.22 quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973). However, unlike in *Moe*, the State has not asserted that it may tax Indians who reside off the reservation, and we do not reach that question. The definition of "Indian" in Rule 192 makes no distinction between residents and nonresidents of a tribe's reservation. A transaction's susceptibility to taxation is made solely a function of whether the person taxed is an "Indian" and where the sale or delivery of a purchased item occurs. If the buyer is an Indian and the sale or delivery occurs on the reservation, the transaction is deemed nontaxable, whereas if both occur off the reservation, it is deemed taxable.

[9]This is one of two so-called "enforcement issues." The other relates to whether the State may lawfuly enforce its sales tax by engaging in seizures of Indian property on and/or off the reservation. We do not reach this question because any adjudication of it at the present time would be premature. First, the history of enforcement by

We do not find that *Moe* is so easily distinguished. There the Supreme Court specifically approved a requirement that the Indian retailer collect and remit to the state the excise tax applicable to on-reservation sales to non-Indians. 425 U.S. at 483. Montana had not attempted to assume civil taxing authority over reservation Indians pursuant to the Act of August 15, 1953, Pub. L. No. 83-280, Ch. 505, 67 Stat. 588-90, 392 F. Supp. at 1306, and it is now clear that any attempt to have done so would have been futile. *Bryan v. Itasca County*, 426 U.S. 373 (1976). Thus, in upholding the collection requirement in *Moe*, the Supreme Court approved the exercise by a state of some regulatory power over reservation Indians if related to their on-reservation transactions with non-Indians. Of course, in the exercise of that power, a state may impose only those burdens which have not been preempted and which do not constitute an interference with tribal self-government. 425 U.S. 483. This rule protects the states' interest in ensuring the collection of taxes validly imposed upon non-Indians while also minimizing the impact on Indians.

When viewed against the above standard, it is clear that the State's collection and registration requirements are valid. The collection requirement imposed pursuant to R.C.W. 82.08.050 requires no more than the simple act specifically approved in *Moe*. The Tribe correctly points out that the Supreme Court did strike down Montana's vendor licensing statute as applied to Indian retailers and contends that a similar result is, therefore, required here.

seizure relates exclusively to the seizure of cigarettes as a means of enforcing the State's cigarette tax which we have held to be invalid. There is no factual development or indication as to whether or, if so, how the State would attempt to enforce its sales tax by seizure. Second, the briefing and argument, both in this cause and No. 3868, were developed exclusively with respect to enforcement of the cigarette tax. Finally, we have no reason to believe the Tribe will not abide by this Court's decision that the State may lawfully impose its sales tax on sales to non-Indians in its noncigarette enterprises. Assuming that to be the case, the State would have no occasion to resort to enforcement by seizure.



The statute attacked in *Moe* required the payment of a license fee as a prerequisite in doing business. It, therefore, imposed a tax upon the Indian retailer and could not stand absent congressional consent. *Moe*, 425 U.S. at 475-80. In contrast, the State here imposes only a registration requirement; no fee is imposed upon the Indian retailer. As with the collection requirement "this burden is not, strictly speaking, a tax at all, [and] is not governed by the language of *Mescalero* [*Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)] dealing with the 'special area of state taxation.' " *Moe*, 425 U.S. at 483. Since the one-time registration requirement is even less burdensome than the collection requirement, it follows that it may be lawfuly imposed on Indian retailers doing business with non-Indians.

The Tribe also contests the record keeping requirements which the State has imposed on Dealers with respect to taxable and nontaxable transactions. R.C.W. 82.08.070 requires each seller to make out a monthly return "setting forth the amount of all sales, nontaxable sales, taxable sales, the amount of the tax thereon, and such other information as the department [of Revenue] shall require. * * *" Further, Rule 192 and E.T.B. 504.08.192 require Indian retailers to keep additional specified records solely with respect to nontaxable transactions.

Since the State's power to regulate Indian retailers is no more than an adjunct of its power to tax non-Indians, any exercise of that power would obviously have to be reasonably necessary to ensure payment of taxes imposed on non-Indians, and the State does not contend otherwise. There is, however, no evidence in the record as to whether the record keeping requirements, as promulgated, are or are not reasonably necessary to ensure payment of lawful taxes. In requiring that records be kept which pertain directly to taxable transactions (*e.g.*, the number and dollar volume of sales to non-Indians), the State is merely venturing into an area in which it has recognized, albeit

very limited, power. Such regulations are presumed reasonably necessary and the Tribe has failed to carry its burden to prove the contrary.

On the other hand, in requiring that records be kept as to nontaxable sales (*i.e.*, sales to Indians), the State is placing a burden upon Indian retailers with respect to transactions over which it normally would have no power and which pertains only indirectly to taxable sales. Hence, in such situations the State has the burden to prove that the regulation is reasonably necessary to ensure payment of taxes which it does have power to impose. In its brief, the State argues that it is the opinion of "the professional tax administrators of the Department of Revenue" that the information required about nontaxable sales by Rule 192 and E.T.B. 504.08.192 is necessary to create an "audit trail" to prevent fraudulent tax avoidance. However, the State has offered no evidence, by stipulation or otherwise, to support this contention. Accordingly, we hold and declare that the State may not impose the requirement that the Tribe's noncigarette retailers keep records of nontaxable transactions.

Finally, we conclude that the Tribe is entitled to a declaratory judgment in conformity with the foregoing declarations in this opinion and to permanent injunctive relief in enforcement thereof.

Neither party shall recover costs or attorney fees in these three-judge District Court proceedings.

We deem it expedient and in conservation of judicial time and effort that the issue of the Tribe's recovery of damages, costs and attorney fees therein, if any, resulting from such Supremacy Clause infringements should be remanded to the single-judge District Court for disposition under further order.

The temporary injunctive relief in favor of the Tribe heretofore issued herein is to remain in force and effect until entry of final judgment herein by this Court.

This decision shall constitute the findings of fact and



conclusions of law of this three-judge District Court as provided by Fed. R. Civ. P. 52(a).

Counsel for the Tribe is requested to serve and submit within 30 days from the date hereof a proposed final declaratory judgment and decree of permanent restraint in accordance with the foregoing decision.

DATED this 14th day of February, 1978, in duplicate, one for entry in each of the causes, Nos. 3868 and 3909.

/s/_____
JOHN F. KILKENNY
U.S. Senior Circuit Judge

/s/_____
WILLIAM G. EAST
U.S. Senior District Judge

/s/_____
HOWARD B. TURRENTINE
United States District Judge

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION v. STATE OF WASHINGTON, ET AL., NOS. 3868 AND 3909.

KILKENNY, Concurring and Dissenting:

I commend Judge East on his excellent analysis of the problems before us and only regret that I am unable to concur fully. I dissent only in his conclusions that the tribal cigarette ordinances preempted the field and that the state of Washington had no authority to collect its cigarette tax, and the accompanying sales tax on cigarette sales, even as to non-Indian purchasers.

While Judge East is convinced that the case of *Fisher v. District Court*, 424 U.S. 382 (1976), and *Williams v. Lee*, 358 U.S. 217 (1959), are controlling and dispositive of this issue, I am just as convinced that these cases are distinguishable and that *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), and *Fort Mojave Tribe v. San Bernardino*

*County*, 543 F.2d 1253 (CA9 1976), *cert. denied* 430 U.S. 983 (1977), are controlling and that the cigarette and sales taxes on purchases by non-Indians should be upheld.

*Fisher* involved a dispute between two Indians on whether the state of Montana or the Indian Tribal Court had exclusive jurisdiction of an adoption proceeding. There, the Court emphasized that the dispute arose on a reservation, entirely among Indians, and went on to say that to allow any court other than an Indian court jurisdiction would cause a corresponding decline "* * * in the authority of the Tribal Court." Here, the issue arises on Indian land, but non-Indians, as well as Indians are involved. The tax here will be levied against Indians. In *Fisher*, the Court relied heavily on an agreement between the Indian tribe and the United States and the adoption by the tribe of a Constitution and By-Laws pursuant to the Indian Reorganization Act, 48 Stat. 987, a statute specifically intended to encourage Indian tribes to revitalize their self-government. Acting pursuant to this Constitution and By-Laws, the Northern Cheyenne Tribal Council established a Tribal Court and granted it jurisdiction over adoptions "among members of the Northern Cheyenne Tribe." There the Court held that the state court jurisdiction plainly would interfere with the powers of the self-government conferred upon the Northern Cheyenne Tribe and encouraged by federal legislation. Moreover, it would subject a dispute arising on the reservation among reservation Indians to a forum other than their own. The Court went on to say that no federal statute sanctioned this type of interference with tribal self-government. From there the Court concluded that since the adoption proceeding was appropriately characterized as litigation arising on the Indian reservation, the jurisdiction in the Tribal Court was exclusive. There is no similarity between the facts in *Fisher* and those on the record before us and nothing that is said by the *Fisher* Court is in any way relevant to our record.



In *Williams*, the respondent Lee, a non-Indian, operated a general store on the Navajo Reservation in Arizona under a license required by federal statute. He instituted an action in the superior court of Arizona against Williams, a Navajo Indian and his wife, who lived on the reservation, to collect for goods sold to them on credit. The Arizona trial court granted judgment in favor of Lee. The Arizona Supreme Court affirmed and the Supreme Court accepted *certiorari*. The Supreme Court placed considerable emphasis on Arizona's refusal to accept jurisdiction over Indians pursuant to a congressional enabling act. Obviously, the Court felt that because Arizona had chosen not to accept that responsibility it would be anomalous to allow it to assert jurisdiction over a subject matter on which the Tribal Courts would have full power to act. Here, the state of Washington has completely assumed the congressionally authorized jurisdiction over Indians.

Furthermore, the *Williams* Court, like *Fisher*, based its preemption analysis on the strong federal policy of the Indian Reorganization Act to encourage revitalization of tribal self-government. Since the majority has rejected any claim that the tax is prohibited by the Indian Reorganization Act, its reliance on *Williams* and *Fisher* is further weakened. Additionally, the *Fort Mojave* opinion lends support to the concept that matters of Tribal Court jurisdiction merit special preemption consideration. In distinguishing the *Williams* decision on this jurisdiction rationale, this court wrote:

> "The interference with Indian self-government in the instant case is much less serious. No Indian land is being subjected to direct *state court process*." *Id.* at 1258. [Emphasis supplied].

Clearly, both *Fisher* and *Williams* go to jurisdictional issues of state v. Indian courts. Here, there is no such dispute. Rather, the only issue here is the validity of the cigarette and sales taxes as applied to non-Indian purchasers. Consequently, *Fisher* and *Williams* cannot be deemed controlling.

It is my considered judgment that *Moe v. Confederated Salish & Kootenai Tribes, supra,* is controlling on our facts. To me, *Moe* settles the question of when and under what circumstances the cigarette tax may be collected on an Indian reservation. *Moe* involved a challenge by the Indian tribe and some of its members to Montana's cigarette sales taxes and personal property taxes on motor vehicles as applied to reservation Indians and also to the state's vendor licensing statute as applied to tribal members who sell cigarettes at smoke shops on the reservation. Relying upon *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973), and *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), the Supreme Court in *Moe* held that the vendor license fee tax on personal property located within the reservation, as applied to a reservation Indian conducting a cigarette business *for the tribe* on reservation land and the cigarette tax as applied to on-reservation sales by Indians to Indians, would conflict with applicable federal statutes. In so holding, the Supreme Court likened the rights of the tribal members to those of the tribe itself. The Court then went on to hold that the tax immunity for reservation Indians did not constitute invidious racial discrimination against non-Indians contrary to the equal protection clause of the Fifth Amendment. However, the Court limited its decision by requiring the cigarette taxes to be levied on cigarettes sold to non-Indians by on-reservation smoke shops. Moreover, the *Moe* Court held that the Indian proprietor could be obligated to add the tax to the cigarette sales price and thereby aid the state's tax collection and enforcement. In so holding, the Court emphasized the minimal burden in tax collecting, and that in its absence non-Indians purchasing from the tribal seller would escape payment of a lawful tax. *Moe* rejected the contention that the tax frustrated tribal self-government or conflicted with federal statutes dealing with reservation Indian affairs.

Judge East attempts to distinguish *Moe* from the case before us by arguing that in *Moe* there was no tribal



management, financing, or regulation. A careful consideration of the extent of tribal involvement both here and in *Moe* demonstrates the cases' overall similarity. The majority, in my opinion, has extended tribal preemption to unprecedented heights.

The district court opinion in *Moe* fully described the extent of tribal involvement in the regulation of cigarettes.

> "The land is leased from the Tribes upon the Tribal Council's approval of the lessee's plan to erect a smoke shop. The Council controls the purchase of cigarettes for resale by Tribal members and charges an administrative fee in connection therewith." *Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana v. Moe,* 392 F. Supp. 1297, 1313 (D. Mont. 1975).

This is to be likened to the majority's recitation of the Confederated Tribes' regulations. It quickly becomes apparent that the only meaningful difference between the extent of tribal involvement in the two cases is the Confederated Tribes' decision to levy a tax on cigarettes. The mere imposition of a tribal tax does not rise to the level of a preemption of the taxing field on that article. As this court noted in *Fort Mojave Tribe v. San Bernardino County, supra,*

> "The only effect of the tax on the Indians will be the indirect one of perhaps reducing the revenues they will receive from the leases as a result of their inability to market a tax exemption. Such an indirect economic burden cannot be said to threaten the self-governing ability of the tribe." *Id.* at 1258.

Of further significance, is the fact that *Moe* speaks of the tribe's rights and involvement rather than voicing similar concerns on behalf of the individual smoke shop dealers. I quote from the opinion:

> "The tribe would carry these cases significantly further than we have done, however, and urges that the state cannot impose its cigarette tax on sales by Indians to non-Indians because '[i]n simple terms, [the Indian retailer] has been taxed, and * * * has suffered a measurable out-of-pocket loss.' But this

claim ignores the District Court's finding that 'it is the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption.' "

* * * * *

"Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the later class will go virtually unchecked." 425 U.S. 481-482.

The *Moe* court then says:

"The *Tribe* asserts that to make the Indian retailer an 'involuntary agent' for collection of taxes owed by non-Indians is a 'gross interference with [its] freedom from state regulation. * * *' " 425 U.S. at 482. [Emphasis supplied].

and then concludes:

"The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concedely lawful tax. * * * We see nothing in this burden which frustrates tribal self-government. * * *" 425 U.S. at 483.

In my opinion, this language of the *Moe* Court completely answers the majority's view that the imposition of the tax in the instant case frustrates tribal self-government.

Another authority which is closely akin and of controlling importance is *Fort Mojave Tribe v. County of San Bernardino, supra.* There, the county levied a possessory interest tax on non-Indian lessees of land held in trust by the government for the Fort Mojave Indian Tribe. The court determined that the imposition of this type of tax on non-Indian lessees did not violate the Indian Reorganization Act and was not invalid as being an infringement upon the tribe's right to govern itself. The court also held that the imposition of such a tax by both the Fort Mojave Indian Tribe and the California county on non-Indian lessees of Indian land did not result in improper double taxation. In *Fort Mojave,* the tribe itself imposed a tax on the lease. Here, the tribe itself imposed a



tax on the cigarettes. In discussing this "double taxation" issue, the *Fort Mojave* court found no improper double taxation since the taxes were being imposed by two different and distinct taxing authorities and concluded that the uncertain economic burden there imposed on the tribe's ability to levy a tax did not interfere with its right of self-government. We note that the *Fort Mojave* court made full use of the Supreme Court decision in *Moe* in arriving at its own conclusion.

Despite what is said by the majority, I find nothing in the record to support Judge East's conclusions that the tribe has preempted, or even attempted to preempt, the entire field of taxation on Indian reservations. Because the state of Washington can lawfully impose its cigarette tax it follows that the state may also collect its authorized sales tax on cigarette purchases by non-Indians. The majority would find such taxes preempted by tribal regulations. I dissent based on my analysis in the foregoing opinion.

I would hold that the state of Washington can validly impose the cigarette and sales tax in question and require the licensed dealers to account for the tax on all sales to non-Indians, keeping an adequate record of such sales. Because the tax, in my opinion, is legal, it follows that some type of a record must be kept.

I purposely have not spoken with regard to the majority's conclusion that the state of Washington may not impose its personal property tax on automobiles owned by Indians living on the reservation. The record before us is totally inadequate and insufficient to consider a tax that falls precisely in between the totally on-reservation activity in *McClanahan* and the totally off-reservation activity in *Mescalero.*

## APPENDIX B

*[filed May 10, 1978; Clerk's stamp deleted]*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 3868

DECLARATORY JUDGMENT AND DECREE OF PERMANENT RESTRAINT

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,
*Plaintiffs,*

v.

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; and ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,
*Defendants.*

Before: KILKENNY, Circuit Judge, EAST and TURRENTINE, District Judges*

*Originally the statutory three-judge District Court hearing the above was comprised, pursuant to the designation of Chief Judge Richard H. Chambers for the Ninth Circuit under date of June 20, 1973, of the Honorable John F. Kilkenny, Senior U.S. Circuit Judge for the Ninth Circuit, William G. East, Senior U.S. District Judge for the District of Oregon, and Charles L. Powell, Senior U.S. District Judge for the Eastern District of Washington. Thereafter pursuant to the designation of Chief Judge Richard H. Chambers for the Ninth Circuit under date of May 10, 1974, the composition of the statutory three-judge District Court herein was redesignated by the designation and appointment of the Honorable Howard B. Turrentine, U.S. District Judge for the Southern District of California, in lieu of the Honorable Charles L. Powell, and the redesignation and appointment of the Honorable John F. Kilkenny and the Honorable William G. East.



Based upon the Decision entered by a majority of this Court on the 22nd day of February, 1978 pursuant to Fed. R. Civ. P. 52(a),

IT IS ADJUDGED AND DECLARED as follows:

1. **Cigarette tax:** The imposition of the State of Washington cigarette taxing scheme under R.C.W. 82.24, the administrative regulations promulgated thereunder (particularly WAC 458-20-192 and ETB 504.08.192), and any enforcement thereof by assessment, seizure or otherwise against the plaintiffs Confederated Tribes of the Colville Indian Reservation, Lummi Indian Tribe, and Makah Indian Tribe (Tribes) or their licensed dealers are unlawful in that the cigarette taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government.

2. **Tobacco products tax:** The imposition of the State of Washington tobacco products taxing scheme under R.C.W. 82.26, the administrative regulations promulgated thereunder, if any, and any enforcement thereof against any of the Tribes or their licensed dealers are unlawful in that the legal incidence of the tax falls upon the Tribes or their licensed dealers and results in a direct taxation of Indian income derived from on-reservation activities.

3. **Motor Vehicle, Mobile Homes, Travel Trailers and Campers taxes:** The imposition of the State of Washington motor vehicle excise tax under R.C.W. 82.44 and its mobile homes, travel trailers and campers excise tax under R.C.W. 82.50,[1] the administrative regulations promulgated thereunder and any enforcement thereof against any of the Tribes or their reservation resident members regarding motor vehicles, mobile homes, travel trailers and campers, used exclusively or in part on their reservations are unlawful as an infringement of their rights secured under federal statutes and treaties.

[1]The validity of the State of Washington sales/use tax under R.C.W. 82.08 and 82.12 as applied to motor vehicles, travel trailers and

4. **Sales/use tax:** The imposition of the State of Washington sales/use tax under R.C.W. 82.08 and 82.12,[2] the administrative regulations promulgated thereunder and any enforcement thereof against any of the Tribes or their reservation resident members regarding mobile homes delivered to them and located inside the exterior boundaries of their reservations are unlawful as an infringement of their rights secured under federal statutes and treaties.

5. **Record Keeping:** The imposition of a requirement under R.C.W. 82.24.090, 82.26.060, WAC 458-20-192 and ETB 504.08.192, that the Tribes or their licensed dealers keep records of transactions declared (in one and two above) or conceded to be nontaxable is unlawful as an infringement of their rights secured under federal statutes and treaties.

6. **State of Washington Indian Jurisdiction:** The State of Washington's exercise of civil and criminal jurisdiction under R.C.W. 37.12, the regulations promulgated thereunder, and enforcement thereof against the Lummi Indian Tribe or the Makah Indian Tribe or any of their reservation resident members are unlawful as a denial of Equal Protection under the United States Constitution. However, exercise of similar jurisdiction over the Colville Confederated Tribes or any of their reservation resident members does not constitute a violation of the Equal Protection Clause.

7. **Damages:** No party shall recover costs or attorney fees in this three-judge proceeding. In the interest of judicial economy, the issue of the Tribes' recovery of damages, if any, together with costs and attorney fees therein, is remanded to a single judge

campers owned by any of the Tribes or their reservation resident members and used exclusively or in part on their reservations is not adjudicated herein because the Tribes did not raise it as an issue for decision in the pretrial order.

[2]The sales/use tax issue was properly raised in the pretrial order in this context.



District Court for disposition under further hearing and order.

IT IS FURTHER ORDERED AND DECREED that the defendant State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them are hereby permanently enjoined from:

1. Imposing the State of Washington cigarette tax upon non-Indians purchasing cigarettes from any of the Tribes or their licensed dealers on their reservations;

2. Imposing the State of Washington tobacco products tax upon any of the Tribes or their licensed dealers on their reservations;

3. Requiring that such sales and sales to Indians be reported to the State of Washington;

4. From engaging in any action or acting in any manner to assess such taxes upon any of the Tribes or their licensed dealers or to seize cigarettes, tobacco products or their containers, or to confiscate such cigarettes, tobacco products or their containers, owned, possessed or sold by the Tribes or their licensed dealers;

5. Imposing the State of Washington motor vehicle excise tax and its mobile homes, travel trailers and campers excise tax upon any of the Tribes or their reservation resident members regarding motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on the reservation;

6. Imposing the State of Washington sales/use tax upon any of the Tribes or their reservation resident members regarding mobile homes delivered to them and

located inside the exterior boundaries of their reservations.

DATED this 1st day of May, 1978.

/s/_____
WILLIAM G. EAST
U.S. Senior District Judge

/s/_____
HOWARD B. TURRENTINE
United States District Judge

The Honorable John F. Kilkenny joins in the foregoing Declaratory Judgment only to the extent of his concurring opinion. Otherwise, I dissent.

DATED this 8th day of May, 1978.

/s/_____
JOHN F. KILKENNY
U.S. Senior Circuit Judge



## APPENDIX C

*[filed May 10, 1978; Clerk's stamp deleted]*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 3909

DECLARATORY JUDGMENT AND DECREE OF PERMANENT RESTRAINT

UNITED STATES OF AMERICA,
*Plaintiff,*

v.

STATE OF WASHINGTON,
*Defendant,*

CONFEDERATED BANDS & TRIBES OF THE YAKIMA NATION,
*Intervenor-Plaintiff.*

Before: KILKENNY, Circuit Judge, EAST and TURRENTINE, District Judges*

*Originally the statutory three-judge District Court hearing the above was comprised, pursuant to the designation of Chief Judge Richard H. Chambers for the Ninth Circuit under date of June 20, 1973, of the Honorable John F. Kilkenny, Senior U.S. Circuit Judge for the Ninth Circuit, William G. East, Senior U.S. District Judge for the District of Oregon, and Charles L. Powell, Senior U.S. District Judge for the Eastern District of Washington. Thereafter pursuant to the designation of Chief Judge Richard H. Chambers for the Ninth Circuit under date of May 10, 1974, the composition of the statutory three-judge District Court herein was redesignated by the designation and appointment of the Honorable Howard B. Turrentine, U.S. District Judge for the Southern District of California, in lieu of the Honorable Charles L. Powell, and the redesignation and appointment of the Honorable John F. Kilkenny and the Honorable William G. East.

Based upon the Decision entered by a majority of this Court on the 22nd day of February, 1978 pursuant to Fed. R. Civ. P. 52(a):

IT IS ADJUDGED AND DECLARED as follows:

1. **Cigarette tax:** The imposition of the State of Washington cigarette taxing scheme under R.C.W. 82.24, the administrative regulations promulgated thereunder (particularly WAC 458-20-192 and ETB 504.08.192), and any enforcement thereof by assessment, seizure or otherwise against the Intervenor-Plaintiff Yakima Indian Nation (Yakima Nation) or its licensed dealers are unlawful in that the cigarette taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government.

2. **Tobacco products tax:** The imposition of the State of Washington tobacco products taxing scheme under R.C.W. 82.26, the administrative regulations promulgated thereunder, if any, and any enforcement thereof against the Yakima Nation or its licensed dealers are unlawful in that the legal incidence of the tobacco products tax falls upon the Yakima Nation or its licensed dealers and results in a direct taxation of Indian income derived from on-reservation activities.

3. **Sales tax:**

A. **Application to cigarette sales:** The imposition of the State of Washington sales taxing scheme under R.C.W. 82.08, the administrative regulations promulgated thereunder (particularly WAC 458-20-192 and ETB 504.08.192), and any enforcement thereof by assessment, seizure or otherwise against the Yakima Nation or its licensed dealers upon their sales of cigarettes are unlawful in that the sales taxing scheme on cigarettes has been preempted by tribal ordinance.

B. **Application to sales of noncigarette enterprises:** The imposition of the State of Washington sales tax under R.C.W. 82.08 on sales by the Yakima Nation's noncigarette retailers to non-Indians is neither



preempted by tribal ordinance nor does it constitute an interference with tribal self-government.

4. **Collection, registration, and record keeping:** The imposition of a requirement under R.C.W. 82.08.070, 82.24.090, 82.26.060, WAC 458-20-192 and ETB 504.08.192 that the Yakima Nation and its members keep records of transactions declared (in one through three above) or conceded to be nontaxable is unlawful. However, the imposition of requirements under ETB 504.08.192, R.C.W. 82.08.050 and R.C.W. 82.08.070 that the Yakima Nation's noncigarette retailers register without fee with the Washington Department of Revenue, collect lawfully applicable taxes, and keep records as to taxable transactions if valid.

5. **Damages:** No party shall recover costs or attorney fees in this three-judge District Court proceeding. In the interest of judicial economy, the issue of the Yakima Nation's recovery of damages, together with costs and attorney fees therein, if any, is remanded to a single-judge District Court for disposition under further hearing and order.

IT IS FURTHER ORDERED AND DCREED that the Defendant State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them are hereby permanently enjoined from:

1. Imposing the State of Washington cigarette and sales taxes upon non-Indians purchasing cigarettes from the Yakima Nation and its licensed dealers on the Yakima Indian Reservations;

2. Imposing the State of Washington tobacco products tax upon the Yakima Nation and its licensed dealers on the Yakima Indian Reservation;

3. Requiring that such sales and sales to Indians be reported to the State of Washington; and

4. Engaging in any action or acting in any manner to assess such taxes upon the Yakima Nation or its licensed

dealers or to seize cigarettes, tobacco products or their containers, or to confiscate such cigarettes, tobacco products or their containers, owned, possessed or sold by the Yakima Nation and its licensed dealers.

DATED this 1st day of May, 1978.

/s/_____
WILLIAM G. EAST
U.S. Senior District Judge

/s/_____
HOWARD B. TURRENTINE
United States District Judge

The Honorable John F. Kilkenny joins in the foregoing Declaratory Judgment only to the extent of his concurring opinion. Otherwise, I dissent.

DATED this 8th day of May, 1978.

/s/_____
JOHN F. KILKENNY
U.S. Senior Circuit Judge



## APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. 3868

MOTION FOR PARTIAL NEW TRIAL

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, ET AL.,

*Plaintiffs,*

VS.

STATE OF WASHINGTON, ET AL.,

*Defendants.*

NO. 3909

UNITED STATES OF AMERICA,

*Plaintiff,*

VS.

STATE OF WASHINGTON,

*Defendant,*

*and*

CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION,

*Intervenor-Plaintiff.*

Pursuant to Fed. R. Civ. P. 59(a)(2), the defendants hereby move for a partial new trial, the new trial to be limited to the issue of the power of the State of Washington to impose (1) its cigarette tax (chapter 82.24 RCW and the administrative regulations promulgated thereunder) upon non-Indian purchasers from Indians and (2) its sales tax (chapter 82.08 and the administrative regulations promulgated thereupon) with respect to these same transactions.

As grounds for this motion, defendants rely upon two decisions of the United States Supreme Court which clarify the source, nature, and limits of tribal power over Indians and non-Indians, but which were rendered after the decision of this Court and were, accordingly, not available to this Court in its consideration of this case. Those decisions are *Oliphant v. Suquamish Tribe*, ____ U.S. ____ (46 LW 4210, March 6, 1978), and *United States v. Wheeler*, ____ U. S. ____ (46 LW4243, March 22, 1978). Defendants further rely upon a decision of the 10th Circuit, rendered February 17, 1978, *Ute Indian Tribe v. State Tax Commission of the State of Utah*, No. 76-1602.

As will be shown in the brief of defendants to be filed herein, the grounds relied upon by the majority in that portion of its decision as to which a new trial is being requested are completely inconsistent with those decisions.

DATED this 19th day of May, 1978.

/s/_____
SLADE GORTON
Attorney General

/s/_____
MATTHEW J. COYLE
Assistant Attorney General



## APPENDIX E

*[Filed July 17, 1978; Clerk's stamp deleted]*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. 3868

ORDER DENYING MOTION FOR PARTIAL NEW TRIAL

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,
*Plaintiffs,*

v.

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; and ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,
*Defendants.*

Before: KILKENNY, Circuit Judge, EAST and TURRENTINE, District Judges*

The matter of the motion of the defendants State of Washington, et al., for a partial new trial herein pursuant to Fed. R. Civ. P. 59(a)(2) was heretofore ordered submitted on the record. This Court having now carefully considered the able and extensive briefing by counsel and being fully advised in the premises, it is

ORDERED that the motion of the defendants State of

*See Chief Judge's designations filed herein.

Washington, et al., for a partial new trial is hereby denied.

DATED this 10th day of July, 1978.

/s/_____
WILLIAM G. EAST
U. S. Senior District Judge

/s/_____
HOWARD B. TURRENTINE
United States District Judge

The Honorable John F. Kilkenny joins in the foregoing Order only to the extent of his concurring opinion. Otherwise, I dissent.

DATED this 10th day of July, 1978.

/s/_____
JOHN F. KILKENNY
U. S. Senior Circuit Judge



## APPENDIX F

*[Filed July 17, 1978; Clerk's stamp deleted]*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. 3909

ORDER DENYING MOTION FOR PARTIAL NEW TRIAL

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

STATE OF WASHINGTON,

*Defendant,*

CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION,

*Intervenor-Plaintiff.*

Before: KILKENNY, Circuit Judge, EAST and TURRENTINE, District Judges*

The matter of the State of Washington's motion for a partial new trial herein pursuant to Fed. R. Civ. P. 59(a)(2) was heretofore ordered submitted on the record. This Court having now carefully considered the able and extensive briefing by counsel and being fully advised in the premises, it is

ORDERED that the State of Washington's motion for a

*See Chief Judge's designations filed herein.

partial new trial is hereby denied.

DATED this 10th day of July, 1978.

/s/_____
WILLIAM G. EAST
U. S. Senior District Judge

/s/_____
HOWARD B. TURRENTINE
United States District Judge

The Honorable John F. Kilkenny joins in the foregoing Order only to the extent of his concurring opinion. Otherwise, I dissent.

DATED this 10th day of July, 1978.

/s/_____
JOHN F. KILKENNY
U. S. Senior Circuit Judge



## APPENDIX G

*[Filed July 12, 1978; Clerk's stamp deleted]*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CIVIL NO. 3868

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,
*Plaintiffs,*

v.

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; and ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,
*Defendants.*

1. Notice is hereby given that the State of Washington, Charles Hodde, individually and as Director of the Washington Department of Revenue, R. Y. Woodhouse, individually and as Director of the State of Washington Department of Licensing, and Robert S. O'Brien, individually and as Washington State Treasurer, defendants above named, hereby appeal to the Supreme Court of the United States from that portion of the final judgment of the three-judge United States District Court for the Eastern District of Washington, entered May 10, 1978, granting plaintiff Indian Tribes:

(1) A declaratory judgment that the imposition of the State of Washington motor vehicle excise tax under RCW 82.44 and its mobile homes, travel trailers and campers

excise tax under RCW 82.50, the administrative regulations promulgated thereunder and any enforcement thereof against any of the tribes or their reservation resident members regarding motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on their reservations are unlawful as an infringement of their rights secured under federal statutes and treaties.

(2) Granting a declaratory judgment that the State of Washington's exercise of civil and criminal jurisdiction under RCW 37.12, the regulations promulgated thereunder, and enforcement thereof against the Lummi Indian Tribe or the Makah Indian Tribe or any of their reservation's resident members are unlawful as a denial of equal protection under the United States Constitution.

(3) Permanently enjoining the State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from imposing the State of Washington motor vehicle excise tax on its mobile homes, travel trailers and campers excise tax upon any of the Tribes or their reservation resident members regarding motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on the reservation.

2. This appeal is taken pursuant to 28 U.S.C. § 1253.

DATED this 10th day of July, 1978.

SLADE GORTON, Attorney General
State of Washington

By:/s/_____
MATTHEW J. COYLE
Assistant Attorney General
Attorneys for Appellants-
Defendants.

## PROOF OF SERVICE

I, LoRay W. Walker, a secretary in the office of the Attorney General of the State of Washington, depose and



say that on the 10th day of July, 1978, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on appellees herein—Confederated Tribes of the Colville Indian Reservation, Lummi Indian Tribe, and Makah Indian Tribe, by depositing a copy thereof addressed to Robert L. Pirtle, Attorney at Law, Pioneer Building, 600 First Avenue, Seattle, Washington 98104, with first-class postage prepaid in compliance with United States Supreme Court Rule No. 33(1).

All parties required to be served herein have been served.

/s/_____
LORAY W. WALKER

SUBSCRIBED AND SWORN TO before me this 10th day of July, 1978.

/s/_____
NOTARY PUBLIC in and for the State of Washington, residing at Olympia.

## APPENDIX H

[*Filed August 14, 1978; Clerk's stamp deleted*]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CIVIL NO. 3868

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,
*Plaintiffs,*

vs.

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; and ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,
*Defendants.*

1. Notice is hereby given that the State of Washington, Charles Hodde, individually and as Director of the Washington Department of Revenue, Jack G. Nelson, individually and as Director of the State of Washington Department of Licensing, and Robert S. O'Brien, individually and as Washington State Treasurer, defendants above named, hereby appeal to the Supreme Court of the United States from that portion of the final judgment of the three-judge United States District Court for the Eastern District of Washington, entered May 10, 1978, granting plaintiff Indian Tribes:

(1) A declaratory judgment that the imposition of the State's cigarette taxing scheme under RCW 82.24, the administrative regulations promulgated thereunder, and any enforcement thereof by seizure or otherwise against



any of the Tribes or their respective retail dealers are unlawful in that the State's cigarette taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government; and

(2) Permanently enjoining the State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from imposing the State's cigarette taxing scheme against any of the Tribes or their retail dealers.

2. The above-named defendants moved the United States District Court for the Eastern District of Washington for a partial new trial on that portion of its final judgment stated above. Said motion for partial new trial was denied on July 10, 1978.

3. This appeal is taken pursuant to 28 U.S.C. § 1253.

DATED this 10th day of August, 1978.

SLADE GORTON, Attorney General
State of Washington

RICHARD H. HOLMQUIST
Sr. Assistant Attorney General

By/s/ _____
MATTHEW J. COYLE
Assistant Attorney General
Attorneys for Appellants-Defendants.

## PROOF OF SERVICE

I, Gloria J. Steele, secretary in the office of the Attorney General of the State of Washington, depose and say that on the 10th day of August, 1978, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on appellees herein—Confederated Tribes of the Colville Indian Reservation, Lummi Indian

Tribe, and Makah Indian Tribe, by depositing a copy thereof addressed to Robert L. Pirtle, Attorney at Law, Pioneer Building, 600 First Avenue, Seattle, Washington, 98104, with first-class postage prepaid in compliance with United States Supreme Court Rule No. 33(1).

All parties required to be served herein have been served.

/s/_____
GLORIA J. STEELE

SUBSCRIBED AND SWORN TO before me this 10th day of August, 1978.

/s/_____
NOTARY PUBLIC in and for the State of Washington, residing at Olympia.



## APPENDIX I

*[Filed September 8, 1978; Clerk's stamp deleted]*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CIVIL NO. 3868

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,
*Plaintiffs,*

vs.

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; and ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,
*Defendants.*

1. Notice is hereby given that the State of Washington, Charles Hodde, individually and as Director of the Washington Department of Revenue, Jack G. Nelson, individually and as Director of the State of Washington Department of Licensing, and Robert S. O'Brien, individually and as Washington State Treasurer, defendants above named, hereby appeal to the Supreme Court of the United States from that portion of the final judgment of the three-judge United States District Court for the Eastern District of Washington, entered May 10, 1978, granting plaintiff Indian Tribes:

(1) A declaratory judgment that the imposition of the State's cigarette taxing scheme under RCW 82.24, the administrative regulations promulgated thereunder, and any enforcement thereof by seizure or otherwise against

any of the Tribes or their respective retail dealers are unlawful in that the State's cigarette taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government; and

(2) Permanently enjoining the State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from imposing the State's cigarette taxing scheme against any of the Tribes or their retail dealers.

(3) A declaratory judgment that the imposition of the State of Washington motor vehicle excise tax under RCW 82.44 and its mobile homes, travel trailers and campers excise tax under RCW 82.50, the administrative regulations promulgated thereunder and any enforcement thereof against any of the tribes or their reservation resident members regarding motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on their reservations are unlawful as an infringement of their rights secured under federal statutes and treaties.

(4) Granting a declaratory judgment that the State of Washington's exercise of civil and criminal jurisdiction under RCW 37.12, the regulations promulgated thereunder, and enforcement thereof against the Lummi Indian Tribe or the Makah Indian Tribe or any of their reservation's resident members are unlawful as a denial of equal protection under the United States Constitution.

(5) Permanently enjoining the State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from imposing the State of Washington motor vehicle excise tax on its mobile homes, travel trailers and campers excise tax upon any of the Tribes or their reservation resident members regarding motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on the reservation.

2. The above-named defendants moved the United States District Court for the Eastern District of Washington for a partial new trial on that portion of its



final judgment contained in paragraph 1(1) and 1(2) above. Said motion for partial new trial was denied on July 10, 1978.

3. This appeal is taken pursuant to 28 U.S.C. §1253.

DATED this 8th day of September, 1978.

SLADE GORTON, Attorney General
State of Washington

By: /s/ _____
Matthew J. Coyle
Assistant Attorney General

Attorneys for Appellants-
Defendants.

## PROOF OF SERVICE

I, LoRay W. Walker, a secretary in the Office of the Attorney General of the State of Washington, depose and say that on the 8th day of September, 1978, I served a copy of the foregoing Amended Notice of Appeal to the Supreme Court of the United States on appellees herein — Confederated Tribes of the Colville Indian Reservation, Lummi Indian Tribe, and Makah Indian Tribe, by depositing a copy thereof addressed to Robert L. Pirtle, Attorney at Law, Pioneer Building, 600 First Avenue, Seattle, Washington 98104, with first-class postage prepaid in compliance with United States Supreme Court Rule No. 33(1).

All parties required to be served herein have been served.

/s/_____
LORAY W. WALKER

SUBSCRIBED AND SWORN TO before me this 8th day of September, 1978.

/s/_____
NOTARY PUBLIC in and for the State of Washington, residing at Olympia.



## APPENDIX J

*[Filed August 14, 1978, Clerk's stamp deleted]*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CIVIL NO. 3909

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

vs.

STATE OF WASHINGTON,

*Defendant,*

and

CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION,

*Intervenor-Plaintiff.*

1. Notice is hereby given that the State of Washington, defendant above named, hereby appeals to the Supreme Court of the United States from that portion of the final judgment of the three-judge United States District Court for the Eastern District of Washington, entered May 10, 1978, granting plaintiff and intervenor-plaintiff:

(1) A declaratory judgment that the imposition of the State's cigarette taxing scheme under RCW 82.24, the administrative regulations promulgated thereunder, and any enforcement thereof by seizure or otherwise against the Tribe or its retail dealers are unlawful in that the State's taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government; and

(2) A declaratory judgment that the application of the State's sales tax to tribal cigarette sales to non-Indians has been preempted and that any attempted enforcement

thereof or regulations promulgated thereunder are unlawful; and

(3) Permanently enjoining the State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from imposing the State of Washington cigarette excise tax and sales tax to tribal cigarette sales.

2. The defendant State of Washington moved the United States District Court for the Eastern District of Washington for a partial new trial on that portion of its final judgment stated above. Said motion for partial new trial was denied on July 10, 1978.

3. This appeal is taken pursuant to 28 U.S.C. § 1253.

DATED this 10th day of August, 1978.

SLADE GORTON, Attorney General
State of Washington

Richard H. Holmquist
Sr. Assistant Attorney General

By: /s/ _____
Matthew J. Coyle
Assistant Attorney General

Attorneys for Appellants-
Defendants

## PROOF OF SERVICE

I, Gloria J. Steele, a secretary in the office of the Attorney General of the State of Washington, depose and say that on the 10th day of August, 1978, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on appellees herein — United States of America and the Yakima Indian Nation, by depositing a copy thereof addressed to James J. Gillespie, United States Attorney, 841 United States Courthouse, P. O. Box 1494, Spokane, Washington, 99210, and James R. Hovis,



Attorney at Law, 316 North Third Street, P. O. Box 437, Yakima, Washington, 98907, with first-class postage prepaid in compliance with United States Supreme Court Rule No. 33(1).

All parties required to be served herein have been served.

/s/ _____
Gloria J. Steele

SUBSCRIBED AND SWORN TO Before me this 10th day of August, 1978.

/s/ _____
NOTARY PUBLIC in and for the State of Washington, residing at Olympia.

## APPENDIX K

### United States Constitutional Provisions:

### United States Constitution, Art. I §8, cl. 2

"The Congress shall have Power * * * to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

### United States Constitution, Fourteenth Amendment:

Section 1.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."



## APPENDIX L

### Washington Constitutional Provisions:
### Washington Constitution, Art. 26, § Second:

### COMPACT WITH THE UNITED STATES

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:—

* * * *

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: *Provided*, That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

## APPENDIX M

### Washington Enabling Act:

**25 Stat. 676**

**§4**

* * * And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:

* * * *

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; * * *



## APPENDIX N

### Civil Rights Act of 1968:

**25 U.S.C. §§1321-1326:**

**§1321**

(a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Pub. L. 90-284, Title IV, §401, Apr. 11, 1968, 82 Stat. 78.

**§1322**

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil

causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Pub. L. 90-284, Title IV, §402, Apr. 11, 1968, 82 Stat. 79.

**§1323**

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the



criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Pub. L. 90-284, Title IV, §403, Apr. 11, 1968, 82 Stat. 79.

**§1324**

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

Pub. L. 90-284, Title IV, §404, Apr. 11, 1968, 82 Stat. 79.

**§1325**

(a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this subchapter shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) No cession made by the United States under this subchapter shall deprive any court of the United

States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purpose of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

Pub. L. 90-284, Title IV, §405, Apr. 11, 1968, 82 Stat. 80.

**§1326**

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

Pub. L. 90-284, Title IV, §406, Apr. 11, 1968, 82 Stat. 80.



## APPENDIX O

### United States Statutes:

### Public Law 83-280, 67 Stat. 588 (1953).

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

Sec. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§1162. State jurisdiction over offenses committed by or against Indians in the Indian country.

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State, shall have the same force and effect within such Indian country as they have elsewhere within the State:

| "State of | Indian Country Affected |
|---|---|
| California | All Indian country within the State |
| Minnesota | All Indian country within the State, except the Red Lake Reservation |
| Nebraska | All Indian country within the State |

Oregon .....All Indian country within the State, except the Warm Springs Reservation

Wisconsin .....All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or reguation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

Sec. 3. Chapter 85 of Title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

Sec. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§1360. State civil jurisdiction in action to which Indians are parties.

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and



those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of — Indian Country Affected

California .....All Indian country within the State

Minnesota .....All Indian country within the State, except the Red Lake Reservation

Nebraska .....All Indian country within the State

Oregon .....All Indian country within the State, except the Warm Springs Reservation

Wisconsin .....All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

Sec. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

Sec. 6. Nothwithstanding the provisions of any

Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their state constitution or statutes as the case may be.

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respct to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.



## APPENDIX P

### Washington State Statutes

### Indians and Indian Lands 37.12.010

**37.12.010 Assumption of criminal and civil jurisdiction by state.** The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;

(2) Public assistance;

(3) Domestic relations;

(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further*, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

**37.12.021 ——Resolution of request — Proclamation by governor, 1963 act.** Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body,

duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided,* That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060.

## RETAIL SALES TAX 82.08

**82.08.020 Retail sales tax imposed.** There is levied and there shall be collected a tax on each retail sale in this state equal to four and one-half percent of the selling price: *Provided,* That from and after the first day of June, 1976, until the thirtieth day of June, 1977, such tax shall be levied and collected in an amount equal to four and six-tenths percent of the selling price. The tax imposed under this chapter shall apply to successive retail sales of the same property.

**82.08.030 Exemptions.** The tax hereby levied shall not apply to the following sales: * * *

(4) Sales which the state is prohibited from taxing under the Constitution ofthis state or the Constitution or laws of the United States; * * *

**82.08.050 Buyer to pay, seller to collect tax——Penalties.** The tax hereby imposed shall be paid by the buyer to the seller, and each seller shall collect from the buyer the full amount of the tax payable in respect to each taxable sale in accordance with the schedule of collections adopted by the department pursuant to the provisions of RCW 82.08.060. The tax required by this



chapter, to be collected by the seller, shall be deemed to be held in trust by the seller until paid to the department, and any seller who appropriates or converts the tax collected to his own use or to any use other than the payment of the tax to the extent that the money required to be collected is not available for payment on the due date as prescribed in this chapter shall be guilty of a gross misdemeanor.

In case any seller fails to collect the tax herein imposed or having collected the tax, fails to pay it to the department in the manner prescribed by this chapter, whether such failure is the result of his own acts or the result of acts or conditions beyond his control, he shall, nevertheless, be personally liable to the state for the amount of the tax.

The amount of tax, until paid by the buyer to the seller or to the department, shall constitute a debt from the buyer to the seller and any seller who fails or refuses to collect the tax as required with intent to violate the provisions of this chapter or to gain some advantage or benefit, either direct or indirect, and any buyer who refuse to pay any tax due under this chapter shall be guilty of a misdemeanor. The tax required by this chapter to be collected by the seller shall be stated separately from the selling price and for purposes of determining the tax due from the buyer to the seller and from the seller to the department it shall be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter. * * *

## TAX ON CIGARETTES 82.24

**82.24.020 Tax imposed——Rate——Possession, defined.** There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes, in an amount equal to the rate of six and

one-half mills per cigarette. For purposes of this section, and for purposes of RCW 28A.47.440 and 73.32.130, "possession" shall mean both (1) physical possession by the purchaser and, (2) when cigarettes are being transported to or held for the purchaser or his designee by a person other than the purchaser, constructive possession by the purchaser or his designee, which constructive possession shall be deemed to occur at the location of the cigarettes being so transported or held.

**82.24.030 Stamps to be affixed——Meter machines authorized.** In order to enforce collection of the tax hereby levied, the department of revenue shall design and have printed stamps of such size and denominations as may be determined by the department, such stamps to be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the department to readily ascertain by inspection, whether or not such tax has been paid. Every person shall cause to be affixed on every package of cigarettes on which a tax is due, stamps of an amount equaling the tax due thereon before he sells, offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same: *Provided,* That where it is established to the satisfaction of the department that it is impractical to affix such stamps to the smallest container or package, the department may authorize the affixing of stamps of appropriate denomination to a large container or package.

The department may authorize the use of meter stamping machines for imprinting stamps, which imprinted stamps shall be in lieu of those otherwise provided for under this chapter, and if such use is authorized, shall provide reasonable rules and regulations with respect thereto.

**82.24.040 Duty of wholesaler.** Every wholesaler in this state shall, within a reasonable time after receipt of any of the articles taxed herein, cause the same



to have the requisite denomination and amount of stamps affixed to represent the tax imposed herein: *Provided,* That any wholesaler who furnishes surety bond in a sum satisfactory to the department, shall be permitted to set aside, without affixing the stamps required by this chapter, such part of his stock as may be necessary for the conduct of his business in making sales to persons in another state or foreign country, to instrumentalities of the federal government, or to the established governing bodies of any Indian tribe, recognized as such by the United States Department of the Interior. Such unstamped stock shall be kept separate and apart from stamped stock: *Provided further,* That every wholesaler shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state, or to a federal instrumentality, or to an Indian tribal organization, make a true duplicate invoice of the same which shall show full and complete details of the sale or delivery, whether or not stamps were affixed thereto, and shall transmit such true duplicate invoice to the main office of the department, at Olympia, not later than the fifteenth day of the following calendar month, and for failure to comply with the requirements of this section the department may revoke the permission granted to the taxpayer to maintain a stock of goods to which the stamps required by this chapter have not been affixed. The department may also revoke this permission to maintain a stock of unstamped goods for sale to a specific Indian tribal organization when it appears that sales of unstamped cigarettes to persons who are not enrolled members of a recognized Indian tribe are taking place, or have taken place, within the exterior boundaries of the reservation occupied by that tribe.

**82.24.050 Duty of retailer.** Every retailer shall, within a reasonable time after receipt of any of the articles taxed herein, cause the same to have the requisite denomination and amount of stamps affixed to represent the tax imposed herein: *Provided,* That those articles to

which stamps have been properly affixed by a wholesaler or another retailer may be retained by any retailer, and that those articles intended for sale to qualified purchasers may be retained by federal instrumentalities and Indian tribal organizations, without affixing the stamps required by this chapter.

**82.24.080 Legislative intent.** It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, handled, possessed, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively, in accordance with RCW 82.24.020) or distributes them in the state. It is further the intent and purpose of this chapter that whenever any of the articles herein taxed is given away for advertising or any other purpose, it shall be taxed in the same manner as if it were sold, used, consumed, handled, possessed, or distributed in this state.

It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event occurring within this state: *Provided, however,* That failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

**82.24.260 Selling or disposing of unstamped cigarettes——Retailer to collect and remit tax——Liability.** Any retailer who sells or otherwise disposes of any unstamped cigarettes other than (1) a federal instrumentality with respect to sales to authorized military personnel and (2) a federally recognized Indian tribal organization with respect to sales to enrolled members of the tribe shall collect from the buyer or transferee thereof the tax imposed on such buyer or transferee by RCW 82.24.020, 28A.47.440, and 73.32.130, and remit the same to the department after deducting from the tax collected the compensation he would have been entitled to under the provisions of this chapter, RCW 28A.47.440 and 73.32.130 if he had affixed stamps to the



unstamped cigarettes. Such remittance shall be made at the same time and manner as remittances of the retail sales tax as required under chapters 82.08 and 82.32 RCW. In the event the retailer fails to collect the tax from the buyer or transferee, or fails to remit the same, the retailer shall be personally liable therefor, and shall be subject to the administrative provisions of RCW 82.24.230 with respect to the collection thereof by the department. The provisions of this section shall not relieve the buyer or possessor of unstamped cigarettes from personal liability for the tax mposed by RCW 82.24.020, 28A.47.440 and 73.32.130.

Nothing in this section shall relieve a wholesaler or a retailer from the requirements of affixing stamps pursuant to RCW 82.24.040 and 82.24.050.

## MOTOR VEHICLE EXCISE TAX 82.44

**82.44.020 Basic tax imposed.** An excise tax is imposed for the privilege of using in the state any motor vehicle, except those operated under dealer's licenses. The annual amount of such excise shall be two percent of the fair market value of such vehicle: *Provided,* That in no case shall the tax be less than two dollars.

**82.44.110 Disposition of revenue.** The county auditor shall regularly, when remitting license fee receipts, pay over and account to the director of motor vehicles for the excise taxes collected under the provisions of this chapter. The director shall forthwith transmit the excise taxes to the state treasurer, ninety-eight percent of which excise tax revenue shall upon receipt thereof be credited by the state treasurer to the general fund, and two percent of which excise tax revenue shall be credited by the state treasurer to the motor vehicle fund to defray administrative and other expenses incurred by the state department of motor vehicles in the collection of the excise tax.

## TAXATION OF TRAVEL TRAILERS AND CAMPERS

**82.50.400 Tax imposed——Collection——Transfer of ownership. (Effective until January 1, 1977.)** An annual excise tax is imposed on the owner of any travel trailer or camper for the privilege of using such travel trailer or camper in this state. The tax shall be collected for each calendar year by the department of motor vehicles or the county auditor of the county in which the travel trailer or camper is located at the time payment is made and shall be due on and after January 1st or on the date the travel trailer or camper is first purchased or brought into this state, and paid on or before January 31st of each calendar year or thirty days after the travel trailer or camper is first purchased or brought into this state, whichever is later. No additional tax shall be imposed under this chapter upon any travel trailer or camper upon the transfer of ownership thereof, if the tax imposed by this chapter with respect to such travel trailer or camper has already been paid for the calendar year or fractional part thereof in which such transfer occurs.

**82.50.400 Tax imposed——Collection——Transfer of ownership. (Effective January 1, 1977.)** An annual excise tax is imposed on the owner of any travel trailer or camper for the privilege of using such travel trailer or camper in this state. The tax shall be collected for each registration year by the department of motor vehicles or the county auditor of the county in which the travel trailer or camper is located at the time payment is made and shall be due on and after the first day of the registration year or on the date the travel trailer or camper is first purchased or brought into this state, and paid on or before the first day of each registration year or thirty days after the travel trailer or camper is first purchased or brought into this state, whichever is later. No additional tax shall be imposed under this chapter upon any travel trailer or camper upon the transfer of ownership



thereof, if the tax imposed by this chapter with respect to such travel trailer or camper has already been paid for the registration year or fractional part thereof in which such transfer occurs.

**82.50.410 Rate——Minimum payable. (Effective until January 1, 1977.)** The rate and measure of tax imposed by this chapter for each calendar year shall be one percent of the fair market value of the travel trailer or camper, as determined in the manner provided in this chapter: *Provided,* That the calendar year shall be divided into twelve parts corresponding to the months of the calendar year and the excise tax upon a travel trailer or camper used for the first time in this state after the last day of any month shall only be levied for the remaining months of the calendar year including the month in which the travel trailer or camper is first used: *Provided further,* That the minimum amount of tax payable shall be two dollars.

A travel trailer or camper shall be deemed used for the first time in this state when such vehicle was not previously licensed by this state for the year or any part thereof immediately preceding the year in which application for license is made.

**82.50.410 Rate——Minimum payable. (Effective January 1, 1977.)** The rate and measure of tax imposed by this chapter for each registration year shall be one percent of the fair market value of the travel trailer or camper, as determined in the manner provided in this chapter: *Provided,* That the excise tax upon a travel trailer or camper used for the first time in this state after the last day of any registration month shall only be levied for the remaining months of the registration year including the month in which the travel trailer or camper is first used: *Provided further,* That the minimum amount of tax payable shall be two dollars.

A travel trailer or camper shall be deemed used for the first time in this state when such vehicle was not previously licensed by this state for the registration year

or any part thereof immediately preceding the registration year in which application for license is made.

**82.50.510 Remittance of tax to state—— Distribution to cities, counties and schools.** The county auditor shall regularly, when remitting motor vehicle excise taxes, pay to the state treasurer the excise taxes collected under this chapter. The treasurer shall then distribute such funds quarterly on the first day of the month of January, April, July and October of each year in the following amount: Fifteen percent to cities and towns for the use thereof apportioned ratably among such cities and towns on the basis of population; fifteen percent to counties for the use thereof to be apportioned ratably among such counties on the basis of moneys collected in such counties from the excise taxes imposed under this chapter; and seventy percent for schools to be deposited in the state general fund.

**82.50.540 Taxed and licensed travel trailers or campers entitled to use of streets and highways.** Travel trailers or campers taxed and licensed under the provisions of this chapter shall be entitled to the use of the public streets and highways subject to the provisions of the motor vehicle laws of this state except as herein otherwise provided.



# APPENDIX Q

## WASHINGTON ADMINISTRATIVE REGULATIONS

## WAC 458-20-192 (Rule 192) INDIANS, INDIAN RESERVATIONS

### DEFINITIONS

The term "Indian reservation," as used herein, means all lands, notwithstanding the issuance of any patent, within the exterior boundaries of areas set aside by the United States for the exclusive use and occupancy of Indian tribes by treaty, law, or executive order which areas are currently recognized as "Indian reservations" by the United States Department of the Interior.

The following Washington reservations are the only "Indian reservations" currently recognized as such by the United States Department of Interior: Chehalis, Colville, Hoh, Kalispel, Lower Elwha, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Ozette, Port Gamble, Port Madison, Puyallup, Quileute, Quinault, Shoalwater, Skokomish, Spokane, Squaxin Island, Swinomish, Tulalip, and Yakima.

The term "Indian tribe," as used herein, means any organized Indian nation, tribe, band, or community recognized as an "Indian tribe" by the United States Department of the Interior.

The term "Indian," as used herein, means persons duly registered on the tribal rolls of the Indian tribe occupying an Indian reservation.

NOTE: For purposes of this rule, with respect to determining tax liability regarding any economic transaction or activity, the term "Indian tribe" includes only an Indian tribe upon and within whose Indian reservation such transaction or activity occurs, and the term "Indian" includes only a person duly registered on the tribal rolls of the Indian tribe upon and within whose Indian reservation such transaction or activity occurs.

Under the revenue laws of the State of Washington, the tax liability of Indians and of persons conducting business with Indians is as follows:

## BUSINESS AND OCCUPATION TAX

Indians and Indian tribes are not taxable with respect to business conducted by them wholly within an Indian reservation.

No deduction is allowed to others by reason of business conducted with Indians or Indian tribes within an Indian reservation.

## RETAIL SALES TAX

Indians and Indian tribes are not subject to the sales tax upon sales to them of tangible personal property or otherwise taxable services which are made wholly within an Indian reservation.

Sales of tangible personal property to Indians or Indian tribes by off-reservation persons are subject to the retail sales tax except where the seller makes actual delivery of the property sold to a point within an Indian reservation.

Sales of taxable services to Indians or Indian tribes are subject to the retail sales tax except where the services are rendered entirely within an Indian reservation.

Sales to persons other than Indians are subject to the retail sales tax irrespective of where delivery or rendition of services takes place. Thus, Indian and Indian tribal retailers are required to collect and remit to the state the retail sales tax upon each taxable sale made by them within an Indian reservation to persons other than Indians.

In order to substantiate the tax-exempt status of a retail sale made within an Indian reservation to an Indian purchaser, unless the purchaser is personally known to the retailer as an enrolled Indian, the retailer shall require presentation of a tribal membership card identifying the purchaser as duly registered on the tribal rolls of an Indian



tribe under such lawful criteria as the tribal organization has established. A record shall be retained by the retailer of all tax-exempt sales to support the sales tax deduction on returns filed with the Department, identifying the dollar amount of the sale and indicating the name of the purchaser, tribal affiliation of the purchaser, the Indian reservation to which or within which delivery or rendition of services was made, and the date of sale.

## USE TAX

Indians and Indian tribes are not subject to the use tax upon the use of tangible personal property within an Indian reservation. However, Indians and Indian tribes will become liable for the use tax when any such property is placed into actual use outside the Indian reservation, irrespective of the fact that the first use of the property may have been within the reservation.

SPECIAL APPLICATION OF RETAIL SALES TAX AND USE TAX WITH RESPECT TO SALES OF MOTOR VEHICLES OR TRAILERS TO INDIANS AND INDIAN TRIBES. When motor vehicles or trailers sold to Indians or Indian tribes are licensed by the State of Washington at the time of sale, or at any time thereafter, a presumption is raised that such motor vehicles or trailers are for use on the highways of the State of Washington. When motor vehicles or trailers are licensed prior to delivery, dealers are required to collect the retail sales tax in every instance, regardless of delivery point. County Auditors must collect the use tax when Indians or Indian tribes apply for a license or transfer of registration unless the applicant can show that retail sales tax or use tax has previously been paid on the sale or use of the vehicle or trailer by the applicant.

## CIGARETTE TAX

Sales of cigarettes to non-Indians by Indians or Indian tribes are subject to the cigarette tax, since the tax

is levied upon the non-Indian purchaser and the vendor is obligated to make precollection of the tax. Therefore, Indian or tribal vendors making, or intending to make, sales to non-Indian customers must purchase a stock of cigarettes with Washington state cigarette tax stamps affixed for the purpose of making such sales. However, Indians and Indian tribes may make purchases of unstamped cigarettes from licensed cigarette distributors for resale to qualified purchasers. For purposes of this rule, "qualified purchaser" means (1) an Indian purchasing for resale within the reservation to other Indians, and (2) an Indian purchasing solely for his or her use other than for resale.

Delivery of unstamped cigarettes by a licensed distributor to Indians or Indian tribes must be by bonded carrier or the distributor's own vehicle to the Indian reservation. Delivery of unstamped cigarettes at the distributor's dock or place of business or any other off-reservation location is prohibited.

Revised November 12, 1976.

## EXCISE TAX BULLETIN

ETB 504.08.192 Issued November 24, 1976

### SALES TO OR BY INDIANS

The purpose of the bulletin is to outline procedures to implement Rule 192, as revised November 12, 1976, and to provide additional details for explanation of certain provisions of that administrative rule.

1. **Registration Requirements.** All retailers within an Indian reservation are required to collect sales tax (and cigarette tax) on sales to non-Indians. This means that Indian retailers and Indian tribe retailers are required to be registered to collect and remit to the State the applicable State and local sales tax and the cigarette tax on sales to non-Indians, but no registration fee is required for registration of such retailers. (Such a business license



fee is constitutionally impermissible under Moe v. Salish and Kootenai Tribes, 48 L Ed 2d 96.)

Retailers can accomplish registration by telephoning or going to any of the following offices of the State Department of Revenue:

Aberdeen 532-2840
2700 Simpson Avenue
P.O. Box 1018, 98520

Bellingham 676-2114
2500 Elm Street, Suite A
P.O. Box 1176, 98225

Bremerton 478-4961
Great N.W. Savings & Loan Bldg.
Lower Level, 5th & Pacific
P.O. Box 407, 98310

Ephrata 754-3771
138 W. Division
P.O. Box 1184, 98823

Everett 259-8566
2020 35th Street
P.O. Box 6, 98206

Longview 577-2015
P.O. Box 339
1418 15th St., Weyerhaeuser Credit Union Bldg., Rm. 304, 98632

Mt. Vernon 336-2954
416 Main Street (Monday only)
P.O. Box 278, 98273

Pasco 545-2442
1600 C West Clark
P.O. Box 767, 99301

Port Angeles 457-8503
1601 East Front Street
Bldg. 2, Suite A, 98362

Seattle 464-6827
710 Second Avenue
901 Dexter Horton Bldg., 98104

Spokane 456-3140
300 Northtown Office Bldg.
North 4407 Division, 99207

Tacoma 593-2874
Rm. 207 Professional Bldg.
705 S. 9th, 98405

Vancouver 696-6151
State Office Bldg.
904 Franklin Street
P.O. Box 787, 98660

Walla Walla 527-4306
202 Drumheller Bldg., 99362

Wenatchee 663-1651
1139 Princeton
P.O. Box 1945, 98801

Yakima 575-2783
214 Liberty Bldg.
P.O. Box 407, 98907

Olympia Headquarters 753-5540
412 General Administration Bldg.
Olympia, Washington 98504

2. **Records to be Kept.** Sales to Indians, when delivery is made within the Indian reservation on whose tribal rolls such Indian purchasers are duly registered, are exempt from sales tax. But to demonstrate entitlement to make such sales without collection of tax, all retailers must retain, as a part of their books and records to be

available for examination by the Department of Revenue as specified by RCW 82.32.070, the following for each sale:

a. Name of the Indian purchaser,
b. The tribal affiliation of the purchaser,
c. The Indian reservation to which or within which delivery was made, or within which retail services were rendered,
d. The dollar amount of the sale, and
e. The date of the sale.

Unless the Indian and his tribal affiliation are personally known to the retailer, the retailer must require the purchaser to present a tribal membership card issued by the tribe in which the purchaser is registered.

3. **Measure of Sales Tax on Cigarette or Tobacco Products Sales.** Under the holding of our Court in Canteen Service, Inc. v. State (83 Wn 2d 761) and Tonasket v. State (84 Wn 2d 164) the cigarette tax and tobacco products tax apply upon the "first taxable event" in this state. This makes a different measure for the sales tax in the case of sales by Indians to non-Indians than is the case for a taxable sale by a non-Indian.

a. **Sale by an Indian to a non-Indian:** Here the first taxable event is the possession by the non-Indian and therefore the cigarette or tobacco products tax due on the sale is *not* a part of the selling price on which sales tax is due.

b. **Sale by a non-Indian:** Here the taxable incidence falls on the first handler, distributor, or seller and thus the first taxable event occurs when the products are first handled, distributed, or sold within this state. Since this occurs prior to the retail sale, the cigarette or tobacco products tax is a part of the selling price, even in the case of sales which are sales tax exempt under paragraph 2, above. Canteen Service, supra.



## APPENDIX R

Resolution No. 1974-565
Date Enacted August 23, 1974
Subject Matter _____

RESOLUTION NO. 1974-

COLVILLE TOBACCO ORDINANCE
AS AMENDED

WHEREAS, the Colville Business Council is the duly constituted governing body of the Confederated Tribes of the Colville Indian Reservation, and

WHEREAS, under the Constitution and By-Laws of the Tribes, the Colville Business Council is charged with the duty of protecting the health, security and general welfare of the Colville Confederated Tribes, and

WHEREAS, by virtue of their status as Indian tribes, the Colville Confederated Tribes are authorized by federal law to possess unstamped cigarettes and other tobacco products on the Colville Indian Reservation and to regulate their sale and distribution, and

WHEREAS, the Colville Business Council deems it essential to the health, security and general welfare of the Colville Confederated Tribes to enact a comprehensive tobacco ordinance regulating sale and distribution of cigarettes and other tobacco products and levying an excise tax upon their distribution on the Colville Indian Reservation, and

WHEREAS, the Colville Business Council has heretofore adopted Resolution 1973-375, but now wishes to clarify some sections of that ordinance and to expand the remedies available for violation of the ordinance, and to increase the number of cartons of cigarettes which may be sold to non-Indians,

NOW, THEREFORE, the Colville Business Council does

hereby promulgate and enact the following amended tobacco ordinance to supersede any previous tobacco ordinance heretofore enacted.

## AN ORDINANCE

Governing sale, distribution and taxation of tobacco products within the Colville Indian Reservation

Section 1. Title.

This ordinance shall be known as the Colville Tobacco Ordinance.

Section 2. Definitions.

As used in this ordinance, the following words and phrases shall each have the designated meaning unless a different meaning is expressly provided or the context is clearly indicated:

(a) "Tribes" shall mean the Confederated Tribes of the Colville Indian Reservation.

(b) "Council" shall mean the Colville Business Council.

(c) "Cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

(d) "Tobacco Products" shall mean cigarettes, cigars, smoking tobacco, snuff, chewing tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking.

(e) "Taxable Event" shall mean the sale, use, consumption, handling, possession or distribution of each tobacco product.



(f) "Retail Selling Price" shall mean the ordinary, customary or usual price paid by the consumer for each tobacco product, less the tax levied by this ordinance.

(g) "Wholesale Distribution Price" shall mean the price paid for each tobacco product by the Tribes together with all freight charges and other expenses incurred by the Tribes in their receipt and distribution.

(h) "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land within the Colville Indian Reservation.

(i) "Operator" shall mean an enrolled member of the Colville Confederated Tribes licensed by the Tribes to manage a tobacco outlet.

**Section 3. Establishment of Tobacco Outlets.**

The Council shall establish one or more tobacco outlets within the Colville Indian Reservation as the Council in its sole discretion deems necessary to provide adequate service to consumers of cigarettes and tobacco products.

**Section 4. Nature of Outlet.**

Each tobacco outlet established hereunder shall be a tribal tobacco outlet and shall be managed for the Tribes by an operator pursuant to a license granted by the Council hereunder, and shall also be managed pursuant to a Federal Indian Trader's License as provided in Section 7 hereof.

**Section 5. Application for Tobacco Outlet License.**

Any enrolled member of the Colville Confederated Tribes may apply upon an application form provided by the Council for a tobacco outlet license. The application shall state the name and address of the applicant and shall be signed by the applicant under oath.

**Section 6. Tobacco Outlet License.**

Upon approval of an application, the Council shall

issue the applicant a tobacco outlet license for a five-year period which shall entitle the operator to establish and maintain one tobacco outlet on the Colville Indian Reservation. The license shall be renewable in such manner as the Council shall prescribe and shall be nontransferable.

**Section 7. Trader's License.**

No tobacco outlet license shall be issued to an operator until he has obtained a Federal Indian Trader's License from the Superintendent of the Colville Indian Agency. Revocation of the Federal Indian Trader's License shall be grounds for revocation of the operator's tobacco outlet license.

**Section 8. Excise Tax Imposed.**

There is being levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes in the amount of three cents per package. The Council may levy an additional tax upon the distribution of cigarettes and other tobacco products as it deems desirable. The excise tax levied hereunder shall be a tax upon distribution of cigarettes and other tobacco products by the Tribes only and shall not constitute an assessment or license fee upon enrolled members of the Tribes doing business within the reservation or obtaining special rights or privileges.

The excise tax levied hereunder shall be first a tax upon distribution of cigarettes and other tobacco products by the Tribes pursuant to Section 10 of this ordinance; provided, however, that failure to pay the tax at the time of such distribution shall not prevent tax liability from arising by reason of another taxable event. The excise tax levied hereunder shall be added to the retail price of tobacco products sold to the ultimate consumer.

**Section 9. Purchase by Tribes.**

All tobacco products purchased by the Tribes



pursuant hereto shall be purchased with federally-restricted tribal funds.

**Section 10. Wholesale Distribution.**

Wholesale distribution of tobacco products by the Tribes to a tobacco outlet shall be upon a cash basis for the wholesale distribution price which shall have added to it the excise tax levied in Section 8 hereof.

**Section 11. Tobacco Products Federally Restricted Tribal Property.**

The entire stock of tobacco products distributed hereunder shall remain federally-restricted tribal property owned and possessed by the Tribes until sale to the ultimate consumer. Payment by the operator of the wholesale distribution price plus the excise tax as provided in Section 10 hereof shall entitle the operator to custody of distributed tobacco products for sale to the ultimate consumer, at the operator's sole risk in the event of any loss whatsoever.

**Section 12. Remuneration to Operator.**

As remuneration for managing a tobacco outlet, an operator shall be entitled to the gross revenue derived from sale of tobacco products distributed hereunder in excess of the wholesale distribution price and the excise tax levied hereunder.

**Section 13. Restricted Sales to Non-Indians.**

An operator may not sell more than three cartons of cigarettes per sale to a non-Indian. The Council may restrict sales of other tobacco products to non-Indians as it deems necessary.

**Section 14. Restricted Sales to Minors.**

An operator may not sell any tobacco products to any person under the age of 18 years.

**Section 15. Other Business by Operator.**

An operator may conduct another business simultane-

ously with managing a tobacco outlet for the Tribes. The other business may be conducted on the same premises and the operator shall not be required to maintain separate books of account for the other business.

**Section 16. Tribal Immunity — Liability — Credit.**

An operator shall not attempt or be authorized to waive the sovereign immunity of the Tribes from suit, nor shall such operator attempt or be authorized to create any liability on behalf of the Tribes or to utilize tribal credit.

**Section 17. Operating Without License.**

No person shall operate a tobacco outlet on the Colville Indian Reservation without having in effect a valid tobacco outlet license issued pursuant hereto.

**Section 18. Purchases.**

An operator shall purchase all tobacco products sold in his tobacco outlet from the Tribes.

**Section 19. Liability Insurance.**

An operator shall maintain liability insurance upon his premises in the sum of $100,000.

**Section 20. Revocation of Tobacco Outlet License.**

Failure of an operator to abide by the requirements of this ordinance and any additional requirement imposed by the Council will constitute grounds for revocation of the operator's tobacco outlet license as well as enforcement of the remedies provided in Section 21 below.

**Section 21. Violation — Remedies.**

Upon application by the Chairman of the Council, the Tribal Judge shall issue an order directing the Tribal Law Enforcement Officer to seize all tobacco products from wherever purchased and by whomever owned from any tobacco outlet being operated in violation of this ordinance. Within three days of such seizure, after



adequate notice to the operator of such outlet, a hearing shall be held in Tribal Court at which time the operator of such outlet shall be given an opportunity to present evidence in defense of his activities. If the Tribal Court shall determine by a preponderance of the evidence that such tobacco outlet was being operated in violation of this ordinance, the Judge shall impose a fine of not less than $50 nor more than $250 in addition to the forfeiture of tobacco products described above.

**Section 22. Recovery of Taxes Owed.**

The Tribes shall have a cause of action in Tribal Court to recover any taxes owed and not paid to the Tribes in accordance with this or any previous ordinance.

**Section 23. Separability.**

If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainder of this ordinance, or the application of the provision to other persons or circumstances is not affected.

COLVILLE BUSINESS COUNCIL

/s/_____
AL AUBERTEN, Chairman

THE FOREGOING RESOLUTION was adopted at a special meeting held on August 23, 1974, at which time 8 Council members were present, and was passed by a vote of 8 FOR and 0 AGAINST, the Chairman, or the Vice Chairman in the Chairman's absence, being authorized to sign the Resolution.

/s/_____
LUCY F. COVINGTON, Secretary

## APPENDIX S

Resolution #S-3
Date Enacted August 30, 1974
Subject Matter Tobacco Ordinance

RESOLUTION NO. **S-3** OF THE LUMMI BUSINESS COUNCIL

WHEREAS, the Lummi Business Council is the duly constituted governing body of the Lummi Indian Reservation by authority of the Constitution and By-Laws of the Lummi Tribe of the Lummi Reservation, Washington, as approved April 10, 1970, by the Assistant Commissioner of Indian Affairs; and,

WHEREAS, under the Constitution and By-Laws of the Tribe the Council is charged with the duty of safeguarding and promoting the peace, safety, morals and general welfare of the Lummi Tribe by regulating the conduct of trade and the use and disposition of property upon the Reservation; and,

WHEREAS, by virtue of its status as an Indian Tribe, the Lummi Tribe is authorized by federal law to possess unstamped cigarettes and other tobacco products on the Lummi Indian Reservation and to regulate their sale and distribution; and,

WHEREAS, the Lummi Business Council deems it essential to the peace, safety, morals, and general welfare of the Lummi Tribe to enact a comprehensive tobacco ordinance regulating sale and distribution of cigarettes and other tobacco products and levying an excise tax upon their distribution on the Lummi Indian Reservation; and,

WHEREAS, the Lummi Business Council has heretofore adopted Lummi Tobacco Ordinance, Resolution No. P-35, but now wishes to increase the number of cartons of cigarettes which may be sold to non-Indians,



NOW THEREFORE, the Lummi Business Council does hereby promulgate and enact the following amended tobacco ordinance to supersede any previous tobacco ordinance heretofore enacted.

ORDINANCE NO. **L-40**

Governing sale, distribution and taxation of tobacco products within the Lummi Indian Reservation

**Section 1. Title.**

This ordinance shall be known as the Lummi Tobacco Ordinance.

**Section 2. Definitions.**

As used in this ordinance, the following words and phrases shall each have the designated meaning unless a different meaning is expressly provided or the context is clearly indicated:

(1) "Tribe" shall mean the Lummi Tribe of the Lummi Indian Reservation.

(2) "Council" shall mean the Lummi Business Council.

(3) "Cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

(4) "Tobacco Products" shall mean cigarettes, cigars, smoking tobacco, snuff, chewing tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking.

(5) "Retail Selling Price" shall mean the ordinary, customary or usual price paid by the consumer for each tobacco product, less the tax levied by this ordinance.

(6) "Wholesale Distribution Price" shall mean the price paid for each tobacco product by the Tribe together with all freight charges and other expenses incurred by the Tribe in their receipt and distribution.

(7) "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land within the Lummi Indian Reservation.

(8) "Operator" shall mean an enrolled member of the Lummi Indian Tribe licensed by the Tribe to manage a tobacco outlet.

**Section 3. Establishment of Tobacco Outlets.**

The Council shall establish one or more tobacco outlets within the Lummi Indian Reservation as the Council in its sole discretion deems necessary to provide adequate service to consumers of cigarettes and tobacco products.

**Section 4. Nature of Outlet.**

Each tobacco outlet established hereunder shall be a tribal tobacco outlet and shall be managed for the the Tribe by an operator pursuant to a license granted by the Council hereunder, and shall also be managed pursuant to a federal Indian traders license as provided in Section 7 hereof.

**Section 5. Application for Tobacco Outlet License.**

Any enrolled member of the Lummi Tribe may apply upon an application form provided by the Council for a tobacco outlet license. The application shall state the name and address of the applicant and shall be signed by the applicant under oath.

**Section 6. Tobacco Outlet License.**

Upon approval of an application, the Council shall issue the applicant a tobacco outlet license for a five-year period whch shall entitle the operator to establish and maintain one tobacco outlet on the Lummi Indian



Reservation. The license shall be renewable in such manner as the Council shall prescribe and shall be non-transferable.

**Section 7. Traders License.**

Within 30 days after receipt of a tobacco outlet license, an operator must apply to the Superintendent of the Western Washington Indian Agency for a Federal Indian Trader's License. Failure of an operator to apply for or to obtain a Federal Indian Trader's License shall be grounds for revocation of the operator's tobacco outlet license.

**Section 8. Tax Imposed.**

There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes in the amount of $.01 per package. The Council may levy an additional tax upon the distribution of cigarettes and other tobacco products as it deems desirable.

The excise tax levied hereunder shall be first a tax upon distribution of cigarettes and other tobacco products by the Tribe pursuant to Section 9 of this ordinance; provided, however, that failure to pay the tax at the time of such distribution shall not prevent tax liability from arriving by reason of another taxable event. The excise tax levied hereunder shall be added to the retail price of tobacco products sold to the ultimate consumer.

**Section 9. Wholesale Distribution.**

Wholesale distribution of tobacco products by the Tribe to a tobacco outlet shall be upon a cash basis for the wholesale distribution price which shall have added to it the excise tax levied in Section 8 hereof.

**Section 10. Tobacco Products Federally Restricted Tribal Property.**

The entire stock of tobacco products distributed hereunder shall remain federally restricted tribal property

owned and possessed by the Tribe until sale to the ultimate consumer. Payment by the operator of the wholesale distribution price plus the excise tax as provided in Section 9 hereof shall entitle the operator to custody of distributed tobacco products for sale to the ultimate consumer, at the operator's sole risk in the event of any loss whatsoever.

**Section 11. Remuneration to Operator.**

As remuneration for managing a tobacco outlet, an operator shall be entitled to the gross revenue derived from sale of tobacco products distributed hereunder in excess of the wholesale distribution price and the excise tax levied hereunder.

**Section 12. Restricted Sales to Non-Indians.**

An operator may not sell more than three cartons of cigarettes per sale to a non-Indian. The Council may restrict sales of other tobacco products to non-Indians as to [sic] deems necessary.

**Section 13. Restricted Sales to Minors.**

An operator may not sell any tobacco products to any person under the age of 18 years.

**Section 14. Other Business by Operator.**

An operator may conduct another business simultaneously with managing a tobacco outlet for the Tribe. The other business may be conducted on the same premises and the operator shall not be required to maintain separate books of account for the other business.

**Section 15. Tribal Immunity—Liability—Credit.**

An operator shall not attempt or be authorized to waive the sovereign immunity of the Tribe from suit, nor shall such operator attempt or be authorized to create any liability on behalf of the Tribe or to utilize tribal credit.

**Section 16. Operating Without License.**

No person shall operate a tobacco outlet on the



Lummi Indian Reservation without having in effect a valid tobacco outlet license issued pursuant hereto.

**Section 17. Purchases.**

An operator shall purchase all tobacco products sold in his tobacco outlet from the Tribe.

**Section 18. Liability Insurance.**

An operator shall maintain liability insurance upon his premises in the sum of $100,000.00.

**Section 19. Revocation of Tobacco Outlet License.**

Failure of an operator to abide by the requirements of this ordinance and any additional requirement imposed by the Council will constitute gounds [sic] for revocation of the operator's tobacco outlet license as well as enforcement of the penalties provided in Section 20 below.

**Section 20. Violation—Penalties.**

Upon application by the Chairman of the Council, the tribal judge shall issue an order directing the tribal law enforcement officer to seize all tobacco products from wherever purchased and by whomever owned from any tobacco outlet being operated in violation of this ordinance. Within three (3) days of such seizure, after adequate notice to the operator of such outlet, a hearing shall be held in tribal court at which time the operator of such outlet shall be given the opportunity to present evidence in defense of his activities. If the tribal court shall determine by a preponderance of the evidence that such tobacco outlet was being operated in violation of this ordinance, the judge shall impose a fine of not less than $50.00 nor more than $250.00 in addition to the forfeiture of tobacco products described above.

**Section 21. Recovery of Taxes Owed.**

The Tribe shall have a cause of action in tribal court to recover any taxes owed and not paid to the Tribe in accordance with this or any previous ordinance.

**Section 22. Separability.**

If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainer of this ordinance, or the application of the provision to other persons or circumstances is not affected.

## CERTIFICATION

I certify as Secretary of the Lummi Business Council that the Lummi Business Council is composed of 11 members, 6 of whom, constituting a quorum, were present at a (regular) (special) meeting of the Council on August 30, 1974, held at Marietta, Washington, and that the foregoing Resolution was duly adopted at such meeting by a vote of 5 FOR and 0 AGAINST said Resolution.

/s/_____

Chairman

/s/ _____

Tribal Secretary



## APPENDIX T

Resolution No. 13-75
Date Enacted August 22, 1974
Subject Matter Tobacco Ordinance

RESOLUTION NO. 13-75

MAKAH TOBACCO ORDINANCE AS AMENDED

WHEREAS, the Makah Tribal Council is the governing body of the Makah Tribe, an Indian Chartered Corporation as defined in the Reorganization Act of June 18, 1934, and

WHEREAS, under the Constitution and By-Laws of the Tribe, the Makah Tribal Council is charged with the duty of safeguarding and prompting the peace, safety, morals and general welfare of the Makah Tribe by regulating the conduct of trade and the use and disposition of property upon the Reservation, and

WHEREAS, by virtue of its status as an Indian tribe, the Makah Tribe is authorized by federal law to possess unstamped cigarettes and other tobacco products on the Makah Indian Reservation and to regulate their sale and distribution, and

WHEREAS, the Makah Tribal Council deems it essential to the peace, safety, morals, and general welfare of the Makah Tribe to enact a comprehensive tobacco ordinance regulating sale and distribution of cigarettes and other tobacco products and levying an excise tax upon their distribution on the Makah Indian Reservation, and

WHEREAS, the Makah Tribal Council has heretofore adopted Makah Tobacco Ordinance, Resolution No. 52-73, but now wishes to increase the number of cartons of cigarettes which may be sold to non-Indians,

NOW, THEREFORE, the Makah Tribal Council does hereby promulgate and enact the following amended

tobacco ordinance to supersede any previous tobacco ordinance heretofore enacted.

## AN ORDINANCE

Governing sale, distribution and
taxation of tobacco products within
The Makah Indian Reservation

**Section 1. Title.**

This ordinance shall be known as the Makah Tobacco Ordinance.

**Section 2. Definitions.**

As used in this ordinance, the following words and phrases shall each have the designated meaning unless a different meaning is expressly provided or the context is clearly indicated:

(a) "Tribe" shall mean the Makah Tribe of the Makah Indian Reservation.

(b) "Council" shall mean the Makah Tribal Council.

(c) "Cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

(d) "Tobacco Products" shall mean cigarettes, cigars, smoking tobacco, snuff, chewing tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking.

(e) "Taxable Event" shall mean the sale, use, consumption, handling, possession or distribution of each tobacco product.

(f) "Retail Selling Price" shall mean the ordinary, customary or usual price paid by the consumer for each



tobacco product, less the tax levied by this ordinance.

(g) "Wholesale Distribution Price" shall mean the price paid for each tobacco product by the Tribe together with all freight charges and other expenses incurred by the Tribe in their receipt and distribution.

(h) "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land within the Makah Indian Reservation.

(i) "Operator" shall mean an enrolled member of the Makah Tribe licensed by the Tribe to manage a tobacco outlet.

**Section 3. Establishment of Tobacco Outlets.**

The Council shall establish one or more tobacco outlets within the Makah Indian Reservation as the Council in its sole discretion deems necessary to provide adequate service to consumers of cigarettes and tobacco products.

**Section 4. Nature of Outlet.**

Each tobacco outlet established hereunder shall be a tribal tobacco outlet and shall be managed for the Tribe by an operator pursuant to a license granted by the Council hereunder, and shall also be managed pursuant to a Federal Indian Trader's License as provided in Section 7.

**Section 5. Application for Tobacco Outlet License.**

Any enrolled member of the Makah Tribe may apply upon an application form provided by the Council for a tobacco outlet license. The application shall state the name and address of the applicant and shall be signed by the applicant under oath.

**Section 6. Tobacco Outlet License.**

Upon approval of an application, the Council shall issue the applicant a tobacco outlet license for a five-year period which shall entitle the operator to establish and

maintain one tobacco outlet on the Makah Indian Reservation. The license shall be renewable in such manner as the Council shall prescribe and shall be nontransferable.

**Section 7. Traders License.**

Within 30 days after receipt of a tobacco outlet license, an operator must apply to the Superintendent of the Western Washington Indian Agency for a Federal Indian Trader's License. Failure of an operator to apply for or to obtain a Federal Indian Trader's License shall be grounds for revocation of the operator's tobacco outlet license.

**Section 8. Excise Tax Imposed.**

There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes in the amont of five cents per package. The Council may levy an additional tax upon the distribution of cigarettes and other tobacco products as it deems desirable.

The excise tax levied hereunder shall be first a tax upon distribution of cigarettes and other tobacco products by the Tribe pursuant to Section 9 of this ordinance; provided, however, that failure to pay the tax at the time of such distribution shall not prevent tax liability from arising by reason of another taxable event. The excise tax levied hereunder shall be added to the retail price of tobacco products sold to the ultimate consumer.

**Section 9. Wholesale Distribution.**

Wholesale distribution of tobacco products by the Tribe to a Tobacco outlet shall be upon a cash basis for the wholesale distribution price which shall have added to it the excise tax levied in Section 8 hereof.

**Section 10. Tobacco Products Federally Restricted Trial Property.**

The entire stock of tobacco products distributed hereunder shall remain federally-restricted tribal property



owned and possessed by the Tribe until sale to the ultimate consumer. Payment by the operator of the wholesale distribution price plus the excise tax as provided in Section 9 hereof shall entitle the operator to custody of distributed tobacco products for sale to the ultimate consumer, at the operator's sole risk in the event of any loss whatsoever.

**Section 11. Remuneration to Operator.**

As remuneration for managing a tobacco outlet, an operator shall be entitled to the gross revenue derived from sale of tobacco products distributed hereunder in excess of the wholesale distribution price and the excise tax levied hereunder.

**Section 12. Restricted Sales to Non-Indians.**

An operator may not sell more than three cartons of cigarettes per sale to a non-Indian. The Council may restrict sales of other tobacco products to non-Indians as it deems necessary.

**Section 13. Restricted Sales to Minors.**

An operator may not sell any tobacco products to any person under the age of 18 years.

**Section 14. Other Business by Operator.**

An operator may conduct another business simultaneously with managing a tobacco outlet for the Tribe. The other business may be conducted on the same premises and the operator shall not be required to maintain separate books of account for the other business.

**Section 15. Tribal Immunity — Liability — Credit.**

An operator shall not attempt or be authorized to waive the sovereign immunity of the Tribe from suit, nor shall such operator attempt or be authorized to create any liability on behalf of the Tribe or to utilize tribal credit.

**Section 16. Operating Without License.**

No person shall operate a tobacco outlet on the

Makah Indian Reservation without having in effect a valid tobacco outlet license issued pursuant hereto.

**Section 17. Purchases.**

An operator shall purchase all tobacco products sold in his tobacco outlet from the Tribe.

**Section 18. Liability Insurance.**

An operator shall maintian liability insurance upon his premises in the sum of $100,000.

**Section 19. Revocation of Tobacco Outlet License.**

Failure of an operator to abide by the requirements of this ordinance and any additional requirement imposed by the Council will constitute grounds for revocation of the operator's tobacco outlet license as well as enforcement of the remedies provided in Section 20 below.

**Section 20. Violation — Remedies.**

Upon application by the Chairman of the Council, the Tribal Judge shall issue an order directing the Tribal Law Enforcement Officer to seize all tobacco products from wherever purchased and by whomever owned from any tobacco outlet being operated in violation of this ordinance. Within three days of such seizure, after adequate notice to the operator of such outlet, a hearing shall be held in Tribal Court at which time the operator of such outlet shall be given the opportunity to present evidence in defense of his activities. If the Tribal Court shall determine by a preponderance of this evidence that such tobacco outlet was being operated in violation of this ordinance, the Judge shall impose a fine of not less than $50 nor more than $250 in addition to the forfeiture of tobacco products described above.

**Section 21. Recovery of Taxes Owed.**

The Tribe shall have a cause of action in Tribal Court to recover any taxes owed and not paid to the Tribe in accordance with this or any previous ordinance.



**Section 22. Separability.**

If any provisions of this ordinance or its application to any person or circumstance is held invalid, the remainder of this ordinance, or the application of the provision to other persons or circumstances is not affected.

MAKAH TRIBAL COUNCIL

/s/_____
EUGENE PARKER, Chairman

THE FOREGOING RESOLUTION was adopted at a special meeting held on August 22, 1974, at which time 3 Council members were present, and was passed by a vote of 3 FOR and 0 AGAINST, the Chairman, or the Vice-Chairman in the Chairman's absence, being authorized to sign the Resolution.

/s/_____
JO DEAN HAUFT, Secretary

## APPENDIX U

### RESOLUTION T-22-75

WHEREAS, the sale, handling or distribution of cigarettes on trust or restricted property within the exterior boundaries of the Yakima Indian Reservation by Indians is exempt from taxation by the State of Washington; and

WHEREAS, this exemption arises under the Treaty of 1855 between the U.S. Government and the Yakima Indian Nation; and

WHEREAS, the Yakima Nation has the sovereign power to regulate business and tax the same within the exterior boundaries of the reservation under said Treaty; and

WHEREAS, the trade of cigarettes has been handled in such a manner as to show a need for regulating for the protection of Tribal treaty rights; and

WHEREAS, litigation costs and need for funds in other Tribal programs necessitates an increase in tax and experience under resolution T-57-74 shows the needs for other amendments.

NOW, THEREFORE, BE IT RESOLVED by the Yakima Tribal Council meeting in regular session on this 10th day of September, 1974 at the Yakima Indian Agency, Toppenish, Washington, a quorum being present, that:

SECTION 1. The provisions of this resolution shall be deemed an exercise of the power and authority delegated to the Yakima Tribal Council by the Yakima General Council (T-38-56) to regulate business within the exterior boundaries of the Yakima Indian Reservation and require a Tribal permit to conduct such business.

SECTION 2. On and after the effective date of this resolution, no person shall engage in the sale or distribution of cigarettes or other tobacco products on trust or restricted lands within the exterior boundaries of the Yakima Indian Reservation without first



having obtained and being a holder of a valid and sustaining Tribal permit, visibly displayed in the place of business.

SECTION 3. The application for a Tribal permit under this resolution shall be made to the Yakima Tribal Council and shall contain the following information:

(a) Name, age, date of birth, Yakima enrollment number, degree of Yakima blood and Tribal affiliation.
(b) Residence of applicant now and for the past five (5) years.
(c) The place of business and allotment number.
(d) Provide a financial statement and/or credit reference.
(e) Applicant's employment record for the past five (5) years.
(f) Whether applicant owns trust or restricted lands within the Yakima Indian Reservation.

SECTION 4. A Tribal permit to sell or distribute cigarettes under this resolution shall be Twenty-Five Dollars ($25.00) annually and a permit fee of Two and one-quarter cents (2¼ ¢) per package of the smallest container of cigarettes sold or distributed. Tender of the initial permit fee shall be made at the time of application and other permit fees shall be paid at the time of each and every delivery of cigarettes.

SECTION 5. In determining whether a permit shall issue the Yakima Tribal Council shall take into consideration ownership of the property, location of place of business, financial stability and experience of applicant. The applicant shall be both owner and operator of the business. The Yakima Tribal Council shall limit the number of Tribal permits and location that will adequately service the area and their determination as to whether or not a Tribal permit shall issue is final.

SECTION 6. A Tribal permit to sell or distribute cigarettes or other tobacco products shall be applied for yearly on or before the 30th of June giving at that time a notarized statement of cartons and other tobacco products sold during the previous year and gross income derived therefrom, and further, provide the names of all employees and amount of income earned by each.

SECTION 7. The Yakima Tribal Council shall have the right and authority to examine the books at any reasonable time to verify the sales and salaries paid to employees.

SECTION 8. The owners organize and establish an equal price for their merchandise and an equal wage for all their employees in accordance with the employees ability to operate the business for the owner. All employees shall be enrolled members of the Yakima Indian Nation.

SECTION 9. That no direct benefits be derived by non-Yakimas from the sale of cigarettes, tobacco products, or other merchandise.

SECTION 10. Sales of cigarettes to the United States or to any department thereof which is directly operated and controlled by the government and sales of cigarettes upon which tax stamps issued by the State of Washington is [sic] the lawful amount have been affixed are not covered by the terms of this resolution.

SECTION 11. Licensees shall purchase all tobacco products sold on licensed premises from or through the Yakima Indian Nation.

SECTION 12. Pursuant to Section 41, Chapter 5 of the Law and Order Code, any person who shall violate any of the provisions of this resolution shall be deemed guilty of a violation of the laws of the Yakima Indian Nation and shall be subject to imprisonment in the Tribal jail for not more than ninety (90) days and by a fine of not more than One Hundred Eighty Dollars ($180.00) and/or both such confinement and fine.

SECTION 13. Any permittee who shall fail to comply with the terms of this ordinance in any particular shall have his permit cancelled or suspended. Written notification of the grounds for said cancellation shall be given at least five (5) days prior to a hearing held before the Law and Order Committee to determine if the ordinance has been violated. Cancellation or suspension by said Committee may be appealed to the Yakima Tribal Council.

SECTION 14. This resolution shall be effective upon its passage and approval and T-57-74 is hereby repealed.



DONE AND DATED on this 10th day of September, 1974 at the Yakima Indian Agency, Toppenish, Washington by the Yakima Tribal Council by a vote of 10 for and none against.

/s/_____
WATSON TOTUS, Chairman,
Yakima Tribal Council

ATTEST:

/s/_____
JOE SAMPSON, Secretary,
Yakima Tribal Council

Supreme Court, U. S.
FILED
MAY 5 1979
MICHAEL RODAK, JR., CLERK

# APPENDIX

# IN THE
# SUPREME COURT
## OF THE
## UNITED STATES

OCTOBER TERM, 1978
**No. 78-630**

STATE OF WASHINGTON, ET AL.,
*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, ET AL.,
*Appellees.*

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STATE OF WASHINGTON,
*Appellant,*

v.

UNITED STATES OF AMERICA,
and
CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,
*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

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**FILED OCTOBER 13, 1978**
**JURISDICTION POSTPONED FEBRUARY 21, 1979**

STATE PRINTING PLANT OLYMPIA, WASHINGTON

**APPENDIX**

IN THE

# SUPREME COURT

OF THE

UNITED STATES

---

OCTOBER TERM, 1978

**No. 78-630**

---

STATE OF WASHINGTON, ET AL.,

*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, ET AL.,

*Appellees.*

---

STATE OF WASHINGTON,

*Appellant,*

v.

UNITED STATES OF AMERICA,
and
CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

**FILED OCTOBER 13, 1978**
**JURISDICTION POSTPONED FEBRUARY 21, 1979**

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# NOTATION

The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Jurisdictional Statement:

Consolidated Decision of the District Court for the Eastern District of Washington, filed February 22, 1978 .....A-1

Declaratory Judgment and Decree of Permanent Restraint of the District Court for the Eastern District of Washington in the *Colville* case, No. 3868 below, filed May 10, 1978 .....A-66

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# CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES*

Cause No. 3868 below—The *Colville* Case

May 17, 1973—Plaintiffs' original complaint for declaratory judgment, injunction and damages filed in U.S. District Court for Eastern District of Washington.

May 17, 1973—Plaintiffs filed application for convening of three-judge district court.

June 18, 1973—District Court enters certificate requesting three-judge court (certifying necessity of three-judge court).

August 2, 1973—Plaintiffs file motion for temporary restraining order.

September 19, 1973—Plaintiffs file motion for preliminary injunction.

September 28, 1973—District Court enters order denying temporary restraining order.

October 5, 1973—Plaintiffs renew motion for temporary restraining order.

November 5, 1973—District Court enters temporary restraining order restraining defendants from enforcing state statutes regarding tribal cigarette sales.

August 26, 1974—Preliminary pretrial conference held.

September 5-6, 1974—Hearing on motions before three-judge court.

September 6, 1974—Three-judge court enters preliminary injunction against state defendants.

January 24, 1975—Plaintiffs file amended and supplemental complaint for declaratory judgment, injunction and damages.

June 27, 1975—Second preliminary pretrial conference held.

February 4, 1977—Third preliminary pretrial conference.

*Since this appeal is from two consolidated causes below, Nos. 3868 and 3909 respectively, the docket entries will be listed separately for these two causes. See, J. S. App. 2.



March 28, 1977—Pretrial order entered.

March 28, 1977—Trial of action before three-judge district court.

February 22, 1978—Consolidated decision rendered by three-judge court.

May 10, 1978—Declaratory judgment and decree of permanent restraint entered by three-judge court.

May 22, 1978—Defendants file motion for partial new trial.

July 12, 1978—Defendants file Notice of Appeal to the Supreme Court of the United States.

July 17, 1978—District court enters order denying defendants' motion for partial new trial.

August 14, 1978—Defendants file second Notice of Appeal to the Supreme Court of the United States.

September 8, 1978—Defendants file amended Notice of Appeal to the Supreme Court of the United States.

February 21, 1979—U.S. Supreme Court enters order postponing further consideration of jurisdiction to the hearing of the case on the merits.

---

Cause No. 3909 below—the *Yakima* case

July 18, 1973—Complaint filed by United States of America.

July 19, 1973—U.S. files petition for determination by a three-judge court.

July 20, 1973—District Court enters certificate requesting three-judge court (certifying necessity of three-judge court).

September 14, 1973—U.S. files motion for preliminary injunction.

October 19, 1973—United States files motion for temporary restraining order.

November 5, 1973—District Court enters order granting leave to intervene as party-plaintiff to the Confederated Bands and Tribes of the Yakima Indian Nation as intervenor-plaintiff.

November 5, 1973—District Court enters temporary restraining order against state defendants.

April 24, 1974—Tribe files complaint in intervention.

August 26, 1974—Preliminary pretrial hearing.

September 5-6, 1974—Hearing on motions before three-judge court.

September 6, 1974—District Court enters order granting preliminary injunction against defendant State of Washington.

October 4, 1974—United States files amended complaint.

June 27, 1975—Pretrial hearing conducted.

September 18, 1975—Additional pretrial conference held.

February 28, 1977—Supplemental pretrial order entered.

March 28, 1977—Trial held before three-judge district court.

February 22, 1978—Three-judge court enters consolidated decision.

May 10, 1978—Three-judge district court enters declaratory judgment and decree of permanent restraint.

May 22, 1978—Defendant State files motion for partial new trial.

July 17, 1978—District Court enters order denying defendants' motion for partial new trial.

August 14, 1978—Defendant State files Notice of Appeal to the Supreme Court of the United States.

February 21, 1979—United States Supreme Court enters order postponing further consideration of jurisdiction to the hearing of the case on the merits.

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# CAUSE NO. 3868 BELOW— THE *COLVILLE* CASE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CIVIL NO. 3868

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION AND DAMAGES

[*Filed May 17, 1973*]

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

*Plaintiffs,*

v.

STATE OF WASHINGTON and GEORGE KINNEAR, Individually and as Director of the State of Washington Department of Revenue,

*Defendants.*

---

FOR A FIRST CLAIM FOR RELIEF against defendants, plaintiffs aver:

**1.1 Plaintiffs.**

(a) Plaintiff Colville Confederated Tribes is a sovereign Indian tribe recognized by the United States Government and situated on the Colville Indian Reservation in the Eastern District of Washington. The Tribes are governed by a Constitution and By-laws approved by the Secretary of the Interior on December 26, 1938.

(b) Plaintiff Lummi Indian Tribe is a sovereign Indian tribe, recognized by the United States Government and situated on the Lummi Indian Reservation in the Western District of Washington. The Tribe is governed by

a Constitution and By-laws approved by the Secretary of the Interior on April 10, 1970.

(c) Plaintiff Makah Indian Tribe is a sovereign Indian tribe recognized by the United States Government and situated on the Makah Indian Reservation in the Western District of Washington. The Tribe is governed by a Constitution and By-laws approved by the Secretary of the Interior on May 16, 1936.

**1.2 Defendants.**

Defendants are the State of Washington and the Director of its Department of Revenue, which is charged with the duty under state law of collecting and enforcing the excise tax statutes of the state.

**1.3 Jurisdiction.**

This is an action by three Indian tribes with governing bodies duly recognized by the Secretary of the Interior, and in which the matter in controversy arises under Article I, Sec. 8, Cl. 3 of the United States Constitution, the Fourteenth Amendment of the United States Constitution, the laws of the United States, and in particular, Title 25 of the United States Code, the Treaty of Pt. Elliott, January 22, 1855 (12 Stat. 927), the Treaty with the Makah, January 31, 1855 (12 Stat. 939), and the Executive Order of July 2, 1872 (1 Kapp. 195). Jurisdiction is conferred upon the District Court by 28 U.S.C. §1362 and 28 U.S.C. §§2201 and 2202.

**1.4 Three-Judge District Court.**

Plaintiffs request the convening of a three-judge district court pursuant to 28 U.S.C. §2281-2284 for the reason that the prayer of the Complaint asks for interlocutory and permanent injunctions restraining enforcement of state statutes by restraining the action of a state officer upon the grounds of unconstitutionality of the state statutes.

**1.5 Factual Averments.**

Plaintiff tribes are sovereign Indian nations located



on Indian reservations within the geographical area of the State of Washington. Each plaintiff has enacted a tobacco ordinance regulating the sale, distribution and taxation of cigarettes on its reservation, and each ordinance has been approved by the Secretary of the Interior. Copies of the respective tobacco ordinances are attached hereto as Exhibits A, B and C and incorporated herein verbatim.

Pursuant to its ordinance, each plaintiff has established one or more tribal tobacco outlets on federal Indian trust land on its reservation under the control and jurisdiction of both tribal and federal regulations. The operator of each tribal tobacco outlet is licensed by his respective tribe and is a federally licensed Indian trader.

Cigarettes are purchased by plaintiff tribes with federally restricted tribal funds from authorized wholesalers outside the State of Washington, and are shipped in sealed and licensed trucks of interstate commerce carriers directly to the reservations. There, distribution is made to the tribal tobacco outlets and tribal cigarette taxes are collected, the proceeds of which are used for tribal governmental purposes. Each plaintiff is authorized by the federal government and as a matter of its own inherent tribal sovereignty to sell cigarettes to non-Indians and each has authorized such sales in limited quantities of two cartons per sale to non-Indians in its ordinance.

Defendant State of Washington, by and through its Department of Revenue, has, over a period of eight years, attempted to tax cigarettes sold on plaintiffs' reservations pursuant to tribal and federal laws. On December 19, 1972, the Department of Revenue issued orders to tribal tobacco outlets on each reservation, assessing taxes alleged to be due under Chap. 82.24, RCW.

On April 11, 1973, unstamped cigarettes in the stream of interstate commerce and destined for the Lummi Indian Reservation were seized from the Bellingham warehouse of the Oregon-Nevada-California Freight Systems by agents of the Department of Revenue, declared contraband and forfeited pursuant to RCW 82.24.130 and RCW 82.24.250.

On April 12, 1973, a sealed truck of an interstate commerce carrier enroute to the Lummi Indian Reservation, containing unstamped cigarettes, was stopped by agents of the Department of Revenue and the contents seized, declared contraband and forfeited pursuant to RCW 82.24.130 and RCW 82.24.250.

On April 30, 1973, a sealed truck of an interstate commerce carrier enroute to the Colville Indian Reservation, containing unstamped cigarettes, was stopped by agents of the Department of Revenue and its contents were declared contraband, seized and declared forfeited pursuant to RCW 82.24.130 and RCW 82.24.250.

The State of Washington, through its Department of Revenue, has declared its intention to continue such seizures of unstamped cigarettes shipped from outside the State of Washington and destined for Indian reservations in the future.

### 1.6 Unconstitutional Burden on Indian Commerce.

The averred past and proposed actions of defendants State of Washington and the Department of Revenue, and RCW 82.24, as applied to plaintiffs, constitute unconstitutional burdens on Indian commerce in violation of the pre-emptive right of Congress to regulate such commerce stated in Article I, Sec. 8, Cl. 3 of the United States Constitution, and in violation of the Treaty of Pt. Elliott, the Treaty With The Makah, the Executive Order of July 2, 1872, decisions, statutes, rules and regulations of the United States and its courts, and in violation of the inherent tribal sovereignty of each plaintiff and its tobacco ordinance, rules and regulations.

### 1.7 Legal Basis for Plaintiffs' First Claim for Relief.

The legal basis for plaintiffs' first claim for relief is:

(a) *Tonasket Case* — On September 2, 1971, the Supreme Court of the State of Washington filed an Opinion in the case of *Tonasket v. State of Washington,*



No. 41640 [79 Wn.2d 607, 488 P.2d 281 (1971)]. In that case, the Washington Supreme Court declared that the cigarette excise tax requirements of Washington State law were applicable to cigarette sales on the Colville Indian Reservation. The case was appealed to the Supreme Court of the United States, No. 71-1031. On April 24, 1973, the United States Supreme Court issued a Per Curiam Order vacating the judgment of the Washington State Supreme Court and remanding the case back to the Supreme Court for reconsideration. Thus, the United States Supreme Court has failed to uphold the position of the State of Washington that its cigarette excise tax laws are applicable to a tribal tobacco outlet operated on the Colville Indian Reservation pursuant to a federally approved tribal tobacco ordinance. Other United States Supreme Court cases uphold the principle that Indian property on reservations is not subject to the taxing jurisdiction of the state.

(b) *Indian Commerce Clause* — Article I, Sec. 8, Cl. 3 of the United States Constitution is a grant to Congress of the pre-emptive power to regulate commerce with Indian tribes. The United States Supreme Court has interpreted this provision to mean that taxing and other legal relationships with Indians on reservations may be regulated only by Congress, that the states have no jurisdiction for imposition of their laws on Indian tribes unless such power is specifically granted by Congress, and that only Congress can determine what is contraband in the area of merchandising activities by Indian tribes.

(c) *Federal Statutes and Regulations* — Pursuant to its constitutional authority, Congress has enacted comprehensive federal statutes and regulations regarding Indian commerce, 25 U.S.C. §261, *et seq.*; 25 C.F.R. §251, *et seq.*, including the licensing and regulating of federal Indian traders. Thus Congress has pre-empted the area of Indian commerce under a philosophy of protection of Indians and tribes, and any attempt by the state to levy taxes upon commercial activities on reservations violates that exclusive federal pre-emption of Indian trading.

(d) *Tribal Sovereignty* — As tribes governed by federally approved Constitutions and By-laws, plaintiffs, in their quasi-sovereign capacity, have exercised their sovereign powers to tax and regulate commerce through enactment of tribal tobacco ordinances, making sale and distribution of all tobacco products on their reservations tribal enterprises generating necessary tax revenues for the tribal governmental entities. If the state may impose its cigarette excise tax on cigarettes sold on plaintiffs' reservations, any tribal tax regulating the same commercial activity is automatically eliminated, thus annihilating the sovereign power of plaintiffs to tax and regulate commercial activity on their reservations in violation of the specific provisions of their Constitutions and By-laws and federal law and policy.

(e) *General Allotment Act* — Under the provisions of the General Allotment Act, 24 Stat. 388 (1887), both tribal and allotted trust land on Indian reservations remains free from taxation, both state and federal, as long as it retains its trust status. Under the state excise tax scheme, remedies are provided for default in the payment of a state tax, including a lien on all real property of the taxpayer, RCW 82.32.210, RCW 82.32.240, and the county sheriff is commanded to levy upon and sell the taxpayer's real property to satisfy the lien. Such levies and liens violate the General Allotment Act, and decisions of the United States Supreme Court.

(g) *Public Law 83-280* — Public Law 83-280, 67 Stat. 588 (18 U.S.C. §1162, 28 U.S.C. §1360), provides in Sec. 2(b) and 4(b) that no state assuming Indian jurisdiction pursuant thereto is authorized to encumber or tax any trust or federally restricted real or personal property of an Indian or Indian tribe or regulate the use thereof in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto. The state excise tax scheme and the levies, liens and seizures being made thereunder by defendant State of Washington are direct violations of Sections 2(b) and 4(b) of Public Law 83-280.



(h) *Federal Trust Policy* — A central goal of federal policy underlying the trust status of Indian property is maximum profitability of Indian enterprises. Plaintiffs' tribal tobacco outlets operate on trust land and the title to all cigarettes purchased by plaintiffs remains federally restricted tribal trust property until sale to the ultimate consumer pursuant to plaintiffs' tobacco ordinances. Application of state excise taxes to such enterprises severely diminishes maximum profitability of the use of Indian trust land, thus frustrating federal Indian policy.

FOR A SECOND CLAIM FOR RELIEF against defendants, plaintiffs aver:

**2.1 Parties and Jurisdiction.**

Plaintiffs re-aver paragraphs 1.1 through 1.4 of their First Claim for Relief.

**2.2 Factual Averments.**

Plaintiffs re-aver paragraph 1.5 of their First Claim for Relief.

**2.3 Unconstitutional Burden on Interstate Commerce.**

Defendants' past and proposed actions in stopping federally licensed, sealed trucks, engaged in interstate commerce, bringing Indian property from outside the state to Indian reservations and in attempting to tax such property are an unconstitutional burden on interstate commerce and infringe on the power of Congress to regulate such commerce under Article I, Sec. 8, Cl. 3 of the United States Constitution.

FOR A THIRD CLAIM FOR RELIEF against defendants, plaintiffs aver:

**3.1 Parties and Jurisdiction.**

Plaintiffs re-aver paragraphs 1.1 through 1.4 of their First Claim for Relief.

**3.2 Factual Averments.**

Plaintiffs re-aver paragraph 1.5 above and incorporate it herein by reference.

**3.3 Violation of Fourteenth Amendment.**

In seizing plaintiffs' property as described above and in interfering with plaintiffs' right to sell to non-Indians pursuant to their tobacco ordinances and in accordance with state law, defendants are depriving plaintiffs of their property without due process of law and are denying plaintiffs the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

FOR A FOURTH CLAIM FOR RELIEF against defendants, plaintiffs aver:

**4.1 Parties and Jurisdiction.**

Plaintiffs re-aver paragraphs 1.1 through 1.4 of their First Claim for Relief.

**4.2 Factual Allegations.**

Plaintiffs re-aver paragraph 1.5 of their First Claim for Relief.

**4.3 Tribal Conformity with State Law.**

Defendants have harassed and will continue to harass plaintiffs and have seized and will continue to seize their property despite the fact that plaintiffs' merchandising activities conform to the requirements of state cigarette excise tax laws, RCW 82.24 as amended by Chap. 157, Washington Laws, 1972, 1st Ex. Sess.

**4.4 Legal Basis for Plaintiffs' Fourth Claim for Relief.**

Sec. 6 of Chap. 157, Washington Law, 1972, 1st Ex. Sess. provides that a person who is authorized by this chapter to possess unstamped cigarettes in this state is not in violation of the excise tax law. It then defines "person authorized" as, inter alia, "any Indian tribal organization authorized to possess unstamped cigarettes." Plaintiffs, as



Indian tribes with governing bodies recognized by the Secretary of the Interior, are operating their tribal tobacco outlets under tobacco ordinances providing for the sale, taxation and distribution of said cigarettes, which ordinances have been approved by the Secretary of the Interior. Thus, these Indian tribal organizations have been authorized by their governing bodies and by the United States Government to possess unstamped cigarettes.

Additionally, Sec. 7 of the 1972 Act allows the acquisition and possession, by each Washington consumer of two cartons (400) of cigarettes at any single time, without incurring state tax liability. Plaintiffs' tobacco ordinances provide that sales to non-Indians are limited to two cartons per sale. Plaintiffs are therefore operating their tribal tobacco outlets in complete conformance with the state excise tax laws.

FOR A FIFTH CLAIM FOR RELIEF against defendant State of Washington, plaintiffs aver:

**5.1 Parties and Jurisdiction.**

Plaintiffs re-aver paragraphs 1.1 through 1.4 of their First Claim for Relief.

**5.2 Factual Allegations.**

In 1957, purportedly pursuant to Public Law 83-280 (67 Stat. 588, 18 U.S.C. §1162, 28 U.S.C. §1360), the Legislature of the State of Washington enacted Chap. 240, Laws of 1957, by which the State of Washington attempted to provide means for its assumption of criminal and civil jurisdiction over Indians and Indian reservations in the State. In 1963, purportedly pursuant to Public Law 83-280, the Legislature of the State of Washington enacted Chap. 36, Laws of 1963, by which the State of Washington attempted to assume criminal and civil jurisdiction over all Indians and Indian tribes on trust and restricted lands in the State of Washington, including plaintiffs, in the following eight enumerated areas: Compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, depen-

dent children, operation of motor vehicles upon the public streets, alleys, roads and highways.

In 1965, purportedly pursuant to Chap. 37.12 RCW the Governor of the State of Washington issued a proclamation declaring assumption of full criminal and civil jurisdiction over the Confederated Tribes of the Colville Indian Reservation.

### 5.3 Invalidity of the Assumption of Jurisdiction by the State.

Sec. 6 of Public Law 83-280 requires that Article XXVI, Second Section of the Washington State Constitution by [*sic*] amended prerequisite to state assumption of Indian jurisdiction.

Article XXVI, Second Section, of the Constitution has never been amended. Chap. 240, Laws of 1957, and Chap. 36, Laws of 1963 (codified as Chap. 37.12 RCW) are invalid in that they violate Public Law 83-280, 67 Stat. 588 and 25 Stat. 676, the Enabling Act admitting the State of Washington into the Union; and are unconstitutional since they violate Article XXVI, Second Section, of the State Constitution and the due process clause of the Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, plaintiffs pray for judgment against defendants as follows:

6.1 Declaring that the statutes, regulations and procedures and actions of the State of Washington and the Department of Revenue in taxing and seizing cigarettes being delivered to plaintiffs' reservations and the interference of the State of Washington and the Department of Revenue with the merchandising activities of plaintiffs on their reservations constitute:

(a) Violations of the Order of the United States Supreme Court in *Tonasket v. State of Washington, supra*;

(b) Unconstitutional interference with the regulation of Indian commerce;

(c) Interference in the area of the regulation of



trading on Indian reservations, which area has been exclusively pre-empted by Congress;

(d) Interference with the sovereignty of plaintiff tribes;

(e) An encumbrance on and interference with plaintiffs' trust property;

(f) Violation of federal policies with regard to Indian trust property;

(g) Unconstitutional burdens on interstate commerce;

(h) Unconstitutional deprivation of plaintiffs' property without due process of law and denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

6.2 Declaring that plaintiffs' merchandising and cigarette sale activities are not violative of Chap. 82.24 RCW, as amended.

6.3 Declaring that defendant State of Washington has no authority to enforce state criminal or civil laws against members of the plaintiff tribes and that Chap. 240, Laws of 1957 and Chap. 36, Laws of 1963 (now codified as Chap. 37.12 RCW) are invalid and unconstitutional.

6.4 Issuing interlocutory and permanent injunctions restraining defendants, their agents, employees, servants, officers, successors and all persons in active consort or participation with them from attempting to assess cigarette excise taxes on sales of cigarettes on Indian reservations, seizing cigarettes on said reservations or enroute to said reservations through the State of Washington, attempting to influence cigarette wholesalers not to sell to plaintiffs, and in any way attempting to tax or interfere with the conduct of cigarette merchandising activities on plaintiffs' reservations.

6.5 Awarding damages in an amount not presently ascertainable but which will be proven at trial as compensation for cigarettes seized from and related costs incurred by plaintiff Colville Confederated Tribes.

6.6 Awarding damages in an amount not presently ascertainable but which will be proven at trial as

compensation for cigarettes seized from and related costs incurred by plaintiff Lummi Indian Tribe.

6.7 Awarding damages for lost tax revenues of plaintiff tribes in an amount not presently ascertainable but which will be proven at trial.

6.8 Awarding all costs of this action.

6.9 Awarding reasonable attorneys' fees in this action.

6.10 Awarding such other relief as the Court may deem proper.

DATED at Seattle, Washington this 16th day of May, 1973.

ZIONTZ, PIRTLE & MORISSET

By:/s/_____
Robert L. Pirtle

/s/_____
Barry D. Ernstoff

Of Attorneys for Plaintiffs



## TEMPORARY RESTRAINING ORDER

Entered November 5, 1973
[Caption Omitted in Printing]

THIS MATTER having come on for hearing upon plaintiffs' Motion for Temporary Restraining Order, plaintiffs having appeared by and through their attorneys, Ziontz, Pirtle, Morisset & Ernstoff and Robert L. Pirtle, and defendants having appeared by and through their attorneys, Slade Gorton and William D. Dexter, Assistant Attorney General, the Court having heard the arguments of counsel and having considered the Verified Complaint, the affidavits of Mel Tonasket, Jim McKay, Joe Lawrence, Jr., Barry D. Ernstoff, and Robert L. Pirtle, as well as plaintiffs' Memorandum of Authorities, and affidavits and memoes of defendants the Court being fully advised in the premises, pursuant to 28 U.S.C. §2284, makes and enters the following

### FINDINGS

1. Plaintiff tribes, as evidenced by affidavits of Mel Tonasket, Jim McKay and Joe Lawrence, Jr., urgently require the income and tax revenue from cigarette sales on plaintiff reservations pursuant to plaintiff tribes' federally approved tobacco ordinances, to continue tribally administered programs performing governmental functions on plaintiff reservations and will suffer serious set-backs in tribal programs resulting in damages to the economic and social health of plaintiff tribes and their members.

Based upon the foregoing Findings, it is hereby

ORDERED that during the pendency of this action or until a hearing and determination by the full three-judge Court of plaintiffs' Motion for Preliminary Injunction, or until otherwise ordered by the Court the State of Washington and George Kinnear, individually and as director of the Department of Revenue, State of Washington, their agents, employees, servants, officers and successors, and all persons in active consort or participa-

tion with them, are hereby restrained from enforcing Washington state statutes and regulations regarding cigarettes destined for plaintiff Indian tribes or subordinate tribal organizations, by licensed carrier in interstate commerce and their possession, distribution and ultimate retail sale through tribal tobacco outlets on trust land within the exterior boundaries of the Colville, Lummi and Makah Indian Reservations pursuant to the respective tribal tobacco ordinances, and it is further

ORDERED that plaintiff tribes shall post a bond in the total sum of $10,000, and it is further

ORDERED that defendants' Motion for a Temporary Restraining Order is hereby denied.

DATED this 5th day of November, 1973.

/s/_____
Charles L. Powell
United States District Judge

Presented by:

/s/_____
Robert L. Pirtle of
Attorneys for Plaintiffs

* * * *



## PRELIMINARY INJUNCTION

Entered September 6, 1974
[Caption Omitted in Printing]

THIS MATTER having come on for hearing upon plaintiffs' Motion for Preliminary Injunction, and on plaintiffs' Complaint for Declaratory Judgment, Injunction and Damages, plaintiffs having appeared by and through their attorneys, Ziontz, Pirtle, Morisset & Ernstoff and Robert L. Pirtle, and defendants having appeared by and through their attorneys, Slade Gorton and William D. Dexter, Assistant Attorney General, the Court having heard the arguments of counsel and having considered the Complaint, the affidavits and records herein and briefs of all parties, the Court being fully advised in the premises, and it appearing to the Court that in all probability the plaintiffs will prevail upon the merits, and that the Confederated Tribes of the Colville Indian Reservation, Lummi Indian Tribe and Makah Indian Tribe and their tribal tobacco outlets have suffered and will continue to suffer serious losses of revenue constituting irreparable damage, all of which necessitates the entry of a preliminary injunction, and it being stipulated by the parties that sufficient facts have been shown to exist by the record herein to support this order, which facts are hereby adopted as Findings of Fact herein, it is now

ORDERED that defendants, State of Washington and the Director of the Department of Revenue, State of Washington, and their agents, employees, servants, officers and successors, and all persons in active concert or participation with them, are hereby restrained from enforcing Washington State statutes and regulations regarding cigarettes against the plaintiff Indian tribes or their subordinate tribal organizations on any cigarettes or tobacco products being shipped or delivered to their reservations by licensed carriers in interstate commerce, and the possession, distribution and sale of such cigarettes by such plaintiff Indian tribes and their subordinate tribal

organizations on trust land within the exterior boundaries of the Colville, Lummi and Makah Indian Reservations pursuant to the respective Tribal Tobacco Ordinances, or amendments thereto, pending the determination of this action, or until further order of this Court.

DONE BY THE COURT this 6th day of September, 1974.

/s/_____
John F. Kilkenny
United States Circuit Judge

/s/_____
William G. East
United States District Judge

/s/_____
Howard B. Turrentine
United States District Judge

* * * *



# AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION AND DAMAGES

Filed January 24, 1975
[Caption omitted in printing]

FOR A FIRST CLAIM FOR RELIEF against defendant, plaintiffs aver:

**1.1 Plaintiffs.**

(a) Plaintiff Colville Confederated Tribes is a sovereign Indian tribe recognized by the United States Government and situate on the Colville Indian Reservation in the Eastern District of Washington. The Tribes are governed by a Constitution and By-laws approved by the Secretary of the Interior on December 26, 1938.

(b) Plaintiff Lummi Indian Tribe is a sovereign Indian tribe, recognized by the United States Government and situate on the Lummi Indian Reservation in the Western District of Washington. The Tribe is governed by a Constitution and By-laws approved by the Secretary of the Interior on April 10, 1970.

(c) Plaintiff Makah Indian Tribe is a sovereign Indian tribe recognized by the United States Government and situate on the Makah Indian Reservation in the Western District of Washington. The Tribe is governed by a Constitution and By-laws approved by the Secretary of the Interior on May 16, 1936.

**1.2 Defendants.**

Defendants are the State of Washington and the Director of its Department of Revenue, which is charged with the duty under state law of collecting and enforcing the tax statutes of the state.

**1.3 Jurisdiction.**

This is an action by three Indian tribes with governing bodies duly recognized by the Secretary of the

Interior, and in which the matter in controversy arises under Article I, Sec. 8, Cl. 3 of the United States Constitution, the Fourteenth Amendment of the United States Constitution, the laws of the United States, and in particular, Title 25 of the United States Code, the Treaty of Point Elliott, January 22, 1855 (12 Stat. 927), the Treaty with the Makah, January 31, 1855 (12 Stat. 939), and the Executive Order of July 2, 1872 (1 Kapp. 195). Jurisdiction is conferred upon the District Court by 28 U.S.C. §1362 and 28 U.S.C. §§2201 and 2202.

**1.4 Three-Judge District Court.**

Plaintiffs request the convening of a three-judge district court pursuant to 28 U.S.C. §§2281-2284 for the reason that the prayer of the Complaint asks for interlocutory and permanent injunctions restraining enforcement of state statutes by restraining the action of a state officer upon the grounds of unconstitutionality of the state statutes.

**1.5 Factual Averments.**

Plaintiff tribes are sovereign Indian nations located on Indian reservations within the geographical area of the State of Washington. Plaintiff tribes are units of local government governing their respective reservations. They have always enjoyed immunity from state taxation and jurisdiction through federal statute and policy. The State of Washington has recently begun to attempt to assert its taxation jurisdiction against plaintiff tribes, their reservations and members in the following manners:

(a) *Cigarette Tax.* Each plaintiff tribe has enacted a tobacco ordinance regulating the sale, distribution and taxation of cigarettes on its reservation. Pursuant to its ordinance, each plaintiff has established one or more tribal tobacco outlets on federal Indian trust land on its reservation under the control and jurisdiction of both tribal and federal regulations. The operator of each tribal tobacco outlet is licensed by his respective tribe and is a federally licensed Indian trader.



Cigarettes are purchased by plaintiff tribes with federally restricted tribal funds from authorized wholesalers outside the State of Washington, and are shipped in sealed and licensed trucks of interstate commerce carriers directly to the reservations. There, distribution is made to the tribal tobacco outlets and tribal cigarette taxes are collected, the proceeds of which are used for tribal governmental purposes. Each plaintiff is authorized by the federal government and as a matter of its own inherent Tribal sovereignty to sell cigarettes to non-Indians, and each has authorized such sales in limited quantities of three cartons per sale to non-Indians in its ordinance.

Defendant State of Washington, by and through its Department of Revenue, has, over a period of eight years, attempted to tax cigarettes sold on plaintiffs' reservations pursuant to tribal and federal laws. On December 19, 1972, the Department of Revenue issued orders to tribal tobacco outlets on each reservation, assessing taxes alleged to be due under Ch. 82.24, RCW.

On April 11, 1973, unstamped cigarettes in the stream of interstate commerce and destined for the Lummi Indian Reservation were seized from the Bellingham warehouse of the Oregon-Nevada-California Freight Systems by agents of the Department of Revenue, declared contraband and forfeited pursuant to RCW 82.24.130 and RCW 82.24.250.

On April 12, 1973, a sealed truck of an interstate commerce carrier enroute to the Lummi Indian Reservation, containing unstamped cigarettes, was stopped by agents of the Department of Revenue and the contents seized, declared contraband and forfeited pursuant to RCW 82.24.130 and RCW 82.24.250.

On April 30, 1973, and on October 8, 1973, sealed trucks of an interstate commerce carrier enroute to the Colville Indian Reservation, containing unstamped cigarettes, were stopped by agents of the Department of Revenue and their contents were declared contraband, seized and declared forfeited pursuant to RCW 82.24.130 and RCW 82.24.250.

The State of Washington, through its tax laws, allows the sale of cigarettes by recognized Indian tribes only to a maximum of two cartons per sale to non-Indians.

(b) *Business and Occupation Tax.* Under WAC 458-20-192, revised December 16, 1974, the State of Washington attempts to assess business and occupation tax on businesses conducted by Indians on lands within the exterior boundaries of Indian reservations. Some of plaintiff tribes assess their own business and occupation taxes on their reservations for purposes of additional tribal revenues.

(c) *Use Tax.* Under WAC 458-20-192, the State of Washington attempts to assess use tax upon the use of tangible personal property located upon lands within the exterior boundaries of the respective Indian reservations and used by Indians to produce income in line with the federal policy of encouraging Indians to become economically self-sufficient on their reservations. Included in this use tax is a tax on motor vehicles and trailers sold to Indians and used within the exterior boundaries of their reservations.

(d) *Definitional Violations.* Under WAC 458-20-192, the State of Washington has defined the term "Indian Reservation" as not including "lands the title to which has been allotted in fee simple, or which have been sold, or the alienation of which is unrestricted, even though such lands may be within the boundaries of an Indian reservation as originally set aside". In addition, in the definition section of the revised rule, the State asserts complete taxing jurisdiction on those reservations over which the State has assumed criminal and civil jurisdiction under Public Law 83-280.

**1.6 Unconstitutional Burden on Indian Commerce.**

The averred past and proposed actions of the defendants State of Washington and Department of Revenue, and Washington state taxing statutes and regulations, as applied to plaintiffs, constitute unconstitutional burdens on Indian commerce in violation of the pre-emptive right of Congress to regulate such commerce stated in Article I, Sec. 8, Cl. 3 of the United States Constitution, and in violation of the Treaty of Point Elliott, the Treaty with the Makah, the Executive Order of July 2, 1872, decisions, statutes, rules and regulations of the United States and its courts, and in violation of the inherent tribal sovereignty of each plaintiff and its ordinances, rules, and regulations.



**1.7 Legal Basis for Plaintiffs' First Claim for Relief.**

(a) *Recent case law* — In *Mahoney v. Idaho State Tax Commission,* No. 11016 (September 5, 1973), the Supreme Court of the State of Idaho upheld a judgment restraining the State of Idaho from restraining the State of Idaho from [*sic*] taxing the sale of cigarettes by members of an Indian tribe to non-Indians. Cert. was denied by the United States Supreme Court, 43 L.W. 3356 (December 23, 1974).

In *Walker River Paiute Tribe v. Sheehan,* Civil No. R-2888 — BRT, a federal district court in Nevada enjoined the application of Nevada state excise tax statutes to an Indian reservation cigarette business. The decision of the court in that case was not appealed.

(b) *Indian commerce clause* — Article I, Sec. 8, Cl. 3 of the United States Constitution is a grant to Congress of the pre-emptive power to regulate commerce with Indian tribes. The United States Supreme Court has interpreted this provision to mean that taxing and other legal relationships with Indians on reservations may be regulated only by Congress, that the States have no jurisdiction for imposition of their laws on Indian tribes unless such power is specifically granted by Congress, and that only Congress can determine what is contraband in the area of merchandising activities by Indian tribes.

(c) *Federal Statutes and Regulations* — Pursuant to its constitutional authority, Congress has enacted comprehensive federal statutes and regulations regarding Indian

commerce, 25 U.S.C. §261, *et seq.*; 25 C.F.R. §251, *et seq.*, including the licensing and regulating of federal Indian traders. Thus Congress has pre-empted the area of Indian commerce under a philosophy of protection of Indians and tribes, and any attempt by the state to levy taxes upon commercial activities on reservations violates that exclusive federal pre-emption of Indian trading. In addition, under other federal statutes including the Buck Act, 4 U.S.C. §104, *et seq.*, Indians have specific immunity from the imposition of state taxes.

(d) *Tribal Sovereignty* — As tribes governed by federally approved Constitutions and By-laws, plaintiffs, in their quasi-sovereign capacity, have exercised their sovereign powers to tax and regulate commerce through enactment of tribal taxing ordinances, such as tribal tobacco ordinances, making sale and distribution of all tobacco products on their reservations' tribal enterprises generating necessary tax revenues for the tribal governmental entities. If the state may impose its taxes on plaintiffs' reservations, any tribal tax regulating the same activity is automatically eliminated, thus annihilating the sovereign power of plaintiffs to tax and regulate activities on their reservations and in violation of the specific provisions of their constitutions and by-laws and federal law and policy.

(e) *General Allotment Act* — Under the provisions of the General Allotment Act, 24 Stat. 388 (1887), both tribal and allotted trust land on Indian reservations remains free from taxation, both state and federal, as long as it retains its trust status. Under the state tax schemes, remedies are provided for default in the payment of a state tax, including liens on all real property of the taxpayer, and the county sheriff is commanded to levy upon and sell the taxpayer's property to satisfy the lien. Such levies and liens violate the General Allotment Act, and decisions of the United States Supreme Court.

(g) *Public Law 83-280* — Public Law 83-280, 67 Stat. 588 (18 U.S.C. §1162, 28 U.S.C. §1360), provides in Sec. 2(b) and 4(b) that no state assuming Indian jurisdiction



pursuant thereto is authorized to encumber or tax any trust or federally restricted real or personal property of an Indian or Indian tribe or regulate the use thereof in a manner inconcistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto. The state tax schemes and the levies, liens and seizures being made thereunder by defendant State of Washington are direct violations of Sections 2(b) and 4(b) of Public Law 83-280.

(h) *Federal Trust Policy* — A central goal of federal policy is the maximum profitability of Indian enterprises and tribes. Plaintiffs' tribal tobacco outlets, other tribal taxes, and freedom from state taxation all contribute to the profitability of the use of Indian lands and reservations. Application of state taxes to such individuals, lands, enterprises and property would diminish the maximum profitability of their use, thus frustrating federal Indian policy.

For A Second Claim for Relief against defendants, plaintiffs aver:

**2.1 Parties and Jurisdiction.**

Plaintiffs re-aver paragraphs 1.1 through 1.4 of their First Claim for Relief.

**2.2 Factual Averments.**

Plaintiffs re-aver paragraph 1.5 of their First Claim for Relief.

**2.3 Unconstitutional Burden on Interstate Commerce.**

Defendants' past and proposed actions in stopping federally licensed, sealed trucks, engaged in interstate commerce, bringing Indian property from outside the state to Indian reservations and in attempting to tax such property are an unconstitutional burden on interstate commerce and infringe on the power of Congress to regulate such commerce under Article I, Sec. 8, Cl. 3 of the United States Constitution.

FOR A THIRD CLAIM FOR RELIEF against defendants, plaintiffs aver:

**3.1 Parties and Jurisdiction.**

Plaintiffs re-aver paragraphs 1.1 through 1.4 of their First Claim for Relief.

**3.2 Factual Averments.**

Plaintiffs re-aver paragraph 1.5 above and incorporate it herein by reference.

**3.3 Violation of Fourteenth Amendment.**

In seizing plaintiffs' property as described above and in attempting to levy on Indian property under state tax laws, defendants are depriving plaintiffs of their property without due process of law and are denying plaintiffs equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

FOR A FOURTH CLAIM FOR RELIEF against defendant State of Washington, plaintiffs aver:

**4.1 Parties and Jurisdiction.**

Plaintiffs re-aver paragraphs 1.1 through 1.4 of their First Claim for Relief.

**4.2 Factual Allegations.**

In 1957, purportedly pursuant to Public Law 83-280 (67 Stat. 588, 18 U.S.C. §§1162, 28 U.S.C. §1360), the Legislature of the State of Washington enacted Chap. 240, Laws of 1957, by which the State of Washington attempted to provide means for its assumption of criminal and civil jurisdiction over Indians and Indian reservations in the State. In 1963, purportedly pursuant to Public Law 83-280, the Legislature of the State of Washington enacted Chap. 36, Laws of 1963, by which the State of Washington attempted to assume criminal and civil jurisdiction over all Indians and Indian tribes on trust and restricted lands in the State of Washington, including plaintiffs, in the following eight enumerated areas: Compulsory school



attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, operation of motor vehicles upon the public streets, alleys, roads and highways.

In 1965, purportedly pursuant to Chap. 37.12 RCW the Governor of the State of Washington issued a proclamation declaring assumption of full criminal and civil jurisdiction over the Confederated Tribes of the Colville Indian Reservation.

**4.3 Invalidity of the Assumption of Jurisdiction by the State.**

Sec. 6 of Public Law 83-280 requires that Article XXVI, Second Section of the Washington State Constitution be amended prerequisite to state assumption of Indian jurisdiction.

Article XXVI, Second Section, of the Constitution has never been amended. Chap. 240, Laws of 1957, and Chap. 36, Laws of 1963 (codified as Chap. 37.12 RCW) are invalid in that they violate Public Law 83-280, 67 Stat. 588 and 25 Stat. 676, the Enabling Act admitting the State of Washington into the Union; and are unconstitutional since they violate Article XXVI, Second Section, of the State Constitution and the due process clause of the Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, plaintiffs pray for judgment against defendants as follows:

5.1 Declaring that the statutes, regulations and procedures and actions of the State of Washington and the Department of Revenue in attempting to impose cigarette, business and occupation, and use taxes and in attempting to define Indian reservations under WAC 458-20-192 and in attempting to use Public Law 83-280 as a grant of full taxing jurisdiction constitute:

(a) Unconstitutional interference with the regulation of Indian commerce;

(b) Interference in the area of the regulation of trading on Indian reservations, which area has been exclusively pre-empted by Congress;

(c) Interference with the sovereignty of plaintiff tribes;

(d) An encumbrance on and interference with plaintiffs' property;

(e) Violation of federal policies with regard to Indian trust property;

(f) Unconstitutional burdens on interstate commerce;

(g) Unconstitutional deprivation of plaintiffs' property without due process of law and denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution.

5.2 Declaring that defendant State of Washington has no authority to enforce state criminal or civil laws against members of the plaintiff tribes and that Chap. 240, Laws of 1957 and Chap. 36, Laws of 1963 (now codified as Chap. 37.12 RCW) are invalid and unconstitutional.

5.3 Issuing interlocutory and permanent injunctions restraining defendants, their agents, employees, servants, officers, successors and all persons in active consort or participation with them from attempting to assess cigarette, business and occupation, and use taxes on Indian reservations, seizing any property on said reservations or enroute to said reservations through the State of Washington, and in any way attempting to tax or interfere with the conduct of business activities on plaintiffs' reservations.

5.4 Awarding damages in an amount not presently ascertainable but which will be proven at trial as compensation for cigarettes seized from and related costs incurred by plaintiff Colville Confederated Tribes.

5.5 Awarding damages in an amount not presently ascertainable but which will be proven at trial as compensation for cigarettes seized from and related costs incurred by plaintiff Lummi Indian Tribe.

5.6 Awarding damages for lost tax revenues of plaintiff tribes in an amount not presently ascertainable but which will be proven at trial.

5.7 Awarding all costs of this action.



5.8 Awarding reasonable attorneys' fees in this action.

5.9 Awarding such other relief as the Court may deem proper.

DATED at Seattle, Washington this 3rd day of January, 1975.

ZIONTZ, PIRTLE, MORISSET,
ERNSTOFF & CHESTNUT

By:/s/_____
Robert L. Pirtle

/s/_____
Barry D. Ernstoff

Of Attorneys for Plaintiffs.

## PRE-TRIAL ORDER

Filed March 28, 1977
[Caption omitted in printing]

Pursuant to the Order entered herein on December 14, 1976, the plaintiffs, Confederated Tribes of the Colville Indian Reservation, Lummi Indian Tribe and Makah Indian Tribe, represented by Ziontz, Pirtle, Morisset, Ernstoff & Chestnut and Robert L. Pirtle and Steven S. Anderson, and defendants, State of Washington, Charles Hodde, Director of the State of Washington, Department of Revenue, Jack G. Nelson, Director of the State of Washington, Department of Motor Vehicles, Robert S. O'Brien, Washington State Treasurer, represented by Slade Gorton, Attorney General, Richard H. Holmquist, Senior Assistant Attorney General, and Matthew J. Coyle, Assistant Attorney General, have prepared and filed with the Court this Pre-Trial Order, defining the factual and legal issues to be heard by the three-judge panel convened under 28 U.S.C. §2281.

### 1. JURISDICTION AND NATURE OF PROCEEDINGS.

1.1 **Jurisdiction.** This Court has jurisdiction of this cause pursuant to 28 U.S.C. §1362 since plaintiffs are Indian tribes recognized by the federal government, and pursuant to 28 U.S.C. §2201 and §2202. Jurisdiction of this Court is not defeated with respect to plaintiff Tribes by 28 U.S.C. §1341.

1.2 **Three-Judge Court.** A three-judge Federal District Court was convened pursuant to 28 U.S.C. §2281 on June 18, 1973, on the ground that plaintiffs' complaint seeks to enjoin the enforcement of state statutes as in violation of the Commerce Clause, Art. I, Sec. 8, Cl. 3 and the due process and equal protection clauses of the 14th Amendment of the United States Constitution.



1.3 **Jurisdictional Basis.** This is an action by three Indian tribes with governing bodies duly recognized by the Secretary of the Interior, and in which the matter in controversy arises under Art. I, Sec. 8, Cl. 3 and the due process and equal protection clauses of the 14th Amendment of the United States Constitution, the laws of the United States and in particular Title 25 of the United States Code, the Treaty of Point Elliott, January 22, 1855 (12 Stat. 927), the Treaty with the Makah, January 31, 1855 (12 Stat. 939), and the Colville Executive Order of July 2, 1872 (1 Kapp. 195).

1.4 **Relief Sought by Plaintiffs.** Plaintiffs seek relief as follows:

1.4.1 **State Indian Jurisdiction.** Declaratory judgment and injunctive relief against the exercise by the State of Washington of jurisdiction over the three plaintiff Tribes, their enrolled members and their respective Reservations pursuant to Ch. 240, Laws of 1957 and Ch. 36, Laws of 1963 (now codified as RCW Ch. 37.12) as in violation of the United States Constitution and federal law.

1.4.2 **State Cigarette and Tobacco Products Taxes.** Declaratory judgment, injunctive relief and damages against the defendants and their agents, officers and employees for their allegedly wrongful and unlawful acts in the imposition of state cigarette and tobacco products taxes on cigarettes and tobacco products shipped from outside the State of Washington to tribal cigarette enterprises on the Colville, Lummi, and Makah Indian Reservations, consigned to the respective Tribes and intended for sale by tribal tobacco outlets on trust lands within the three Reservations.

1.4.3 **Seizure of Shipments to Plaintiff Tribes.** Declaratory judgment, injunctive relief and damages against the defendants and their agents, officers and employees for their allegedly wrongful and unlawful acts in seizing as contraband, cigarettes and tobacco products being shipped from outside the State of

Washington to tribal cigarette enterprises on the Colville and Lummi Indian Reservations, consigned to the respective Tribes and intended for sale by tribal tobacco outlets on trust lands within the two respective Reservations.

1.4.4 **Threatened Seizure of Shipments to Plaintiff Tribes.** Declaratory judgment and injunctive relief against the defendants and their agents, officers and employees for their allegedly wrongful and unlawful acts in threatening to seize as contraband, cigarettes and tobacco products being shipped from outside the State of Washington to tribal cigarette enterprises on the Colville, Lummi and Makah Indian Reservations, consigned to the respective Tribes and intended for sale by tribal tobacco outlets on trust lands within the three respective Reservations.

1.4.5 **Threatened Seizure of Property of Tribal Cigarette Outlet Operators.** Declaratory judgment and injunctive relief against the defendants and their agents, officers and employees for their allegedly wrongful and unlawful acts in threatening to levy upon and seize real and personal property of the licensed operators of tribal cigarette outlets of the three plaintiff Tribes to satisfy state cigarette and tobacco products taxes assessed against them.

1.4.6 **State Motor Vehicle Excise Tax.** Declaratory judgment, injunctive relief and damages against the defendants and their agents, officers and employees for their allegedly wrongful and unlawful acts in imposing state motor vehicle excise taxes upon motor vehicles owned by the plaintiff Tribes and their members residing within the exterior boundaries of their respective Reservations.

1.4.7 **State Mobile Home, Travel Trailer and Camper Tax.** Declaratory judgment, injunctive relief and damages against the defendants and their agents, officers and employees for their allegedly wrongful and unlawful acts in imposing state mobile home, travel



trailer and camper taxes upon mobile homes, travel trailers and campers owned by the plaintiff Tribes and their members residing within the exterior boundaries of their respective Reservations.

1.5 **Relief Sought by Defendants.** Defendants seek relief as follows:

1.5.1 **State Statutes Applicable.** Declaratory judgment that Washington State statutes pertaining to taxation of cigarettes, tobacco products, and retail sales are applicable to licensed retailers of the plaintiff Tribes as administered by the defendants in conformity with WAC 458-12-192 (Rule 192) as adopted on November 12, 1976.

1.5.2 **Require Tribes to Collect.** Declaratory judgment that defendants may require the plaintiff Tribes or their licensed tobacco outlet operators to collect and remit cigarette, tobacco products, and sales taxes imposed upon non-members of the Tribes with respect to purchases at retail from the Tribes or their licensed tobacco products outlet operators at locations within the exterior boundaries of their respective Reservations.

## 2. ADMITTED FACTS

The parties hereto, by and through their counsel, stipulate and agree that the facts set forth herein are true and correct, and that several documents attached as exhibits hereto are true, accurate, and conformed copies of the originals thereof, and may be received herein without further authentication, subject to the right of either party to object to any facts herein stipulated to or any portion of any exhibit hereto attached on the grounds of materiality or relevancy.

2.1 **Plaintiff Colville Confederated Tribes.** Plaintiff Colville Confederated Tribes is a sovereign Indian tribe, recognized by the United States government, and consisting of approximately 5,837 members. The Colville Indian Reservation encompasses 1.3 million acres and is governed by the Colville Business Council under a

Constitution and By-Laws approved by the Secretary of the Interior on December 26, 1938.

2.2 **Plaintiff Lummi Indian Tribe.** Plaintiff Lummi Indian Tribe is a sovereign Indian tribe, recognized by the United States government, and consisting of approximately 2,000 members. The Lummi Indian Reservation encompasses 7,319 acres and is governed by the Lummi Indian Business Council under a Constitution and By-Laws approved by the Secretary of the Interior on April 10, 1970.

2.3 **Plaintiff Makah Indian Tribe.** Plaintiff Makah Indian Tribe is a sovereign Indian tribe, recognized by the United States government, and consisting of approximately 1,000 members. The Makah Indian Reservation encompasses approximately 28,000 acres and is governed by the Makah Tribal Council under a Constitution and By-Laws approved by the Secretary of the Interior on May 16, 1936.

2.4 **Location of Reservations.** Colville, Lummi and Makah Indian Reservations are located within the geographical area of the State of Washington.

2.5 **Tribal Tobacco Ordinances.** Each plaintiff has enacted a tobacco ordinance regulating the sale, distribution and taxation of cigarettes on its Reservation, and each ordinance has been approved by the Secretary of the Interior. Pursuant to its ordinance, each plaintiff has established one or more tribal tobacco outlets on federal Indian trust land on its Reservation under the control and jurisdiction of both tribal and federal regulations.

All cigarettes and tobacco products purchased by the plaintiff Tribes pursuant to their tobacco ordinances are paid for with federally-restricted tribal funds from an Individual Indian Money Account in the Bureau of Indian Affairs Agency serving the respective Reservation pursuant to 25 CFR Part 104, entitled "Individual Indian Money Accounts".

All cigarettes and tobacco products are purchased



from authorized wholesalers outside the State of Washington, and are shipped in sealed and licensed trucks of interstate commerce carriers directly to the respective Reservations. There, distribution is made to the tribal tobacco outlets and tribal cigarette taxes fixed by the tribal or business council, are collected. The tribal cigarette tax amounts are as follows:

| **Indian Tribe** | **Cigarette Tax** |
|---|---|
| Colville Indian Tribe | $ .04 per package |
| Lummi Indian Tribe | $ .05 per package |
| Makah Indian Tribe | $ .05 per package. |

The tribal tobacco ordinances provide that the cigarette tax imposed by the Tribes is a tax upon distribution of cigarettes on the Reservation by the respective Tribes through tribal tobacco outlets.

The entire stock of tobacco products distributed by the plaintiff Tribes pursuant to their tribal tobacco ordinances remain tribal property, owned and possessed by the respective Tribes until sale to the ultimate consumer. Payment to the respective Tribes of the wholesale distribution price provided in the ordinances by the operators of tribal tobacco outlets entitle the operators to custody of distributed tobacco products until sale to the ultimate consumer.

The operator of each tribal tobacco outlet is licensed by the respective Tribe and manages the tribally-owned tobacco business in the outlet as a tribal employee. Simultaneously, the operator of each tribal tobacco outlet except the Makah Resort manages his own business, selling a variety of merchandise at retail, including Indian jewelry, baskets, other Indian art, soft drinks and sundries. Business enterprises of the operators of tribal tobacco outlets other than the tobacco business are owned by the operators themselves.

The Colville and Lummi Tribes furnish the operators of their tribal tobacco outlets only with cigarettes and tobacco products pursuant to their tribal ordinances. The operators themselves are required to furnish working

capital and pay all business expenses. As remuneration for managing a tribal tobacco outlet, each operator is entitled to retain the gross revenue derived from sale of cigarettes and tobacco products in excess of the wholesale distribution price and excise tax levied by the respective tribe.

2.6 **Federal Trader's Licenses.** The operator of each tribal tobacco outlet is a federally-licensed Indian trader. In addition, the wholesaler of cigarettes purchased by the three tribal tobacco enterprises is Collins and Wilmes Cigar Company, Portland, Oregon, which is also a federally-licensed Indian trader. Indian trader's licenses issued to the operators of tribal tobacco outlets and the wholesaler in Oregon are issued by the Superintendents of the Bureau of Indian Affairs Agencies serving the respective Reservations pursuant to Secretarial Order No. 2508 of the Secretary of the Interior.

2.7 **State Cigarette Tax Assessments.** Defendant State of Washington, by and through its Department of Revenue, has, over a period of nine years, attempted to tax cigarettes sold by Indians on plaintiffs' reservations. On December 19, 1972, the Department of Revenue issued orders to tribal tobacco outlets on each reservation assessing taxes alleged to be due under RCW Ch. 82.24.

2.8 **State Seizure of Lummi Cigarettes.** On April 11, 1973, unstamped cigarettes in the stream of interstate commerce and destined for the Lummi Indian Reservation were seized from the Bellingham warehouse of the Oregon-Nevada-California Freight Systems by agents of the Department of Revenue, declared contraband and forfeited pursuant to RCW 82.24.130 and RCW 82.24.250. On April 12, 1973, a sealed truck of an interstate commerce carrier enroute to the Lummi Indian Reservation, containing unstamped cigarettes, was stopped by agents of the Department of Revenue and the contents seized, declared contraband and forfeited pursuant to RCW 82.24.130 and RCW 82.24.250. The wholesale



value of the cigarettes, plus the amount of tribal taxes which would have been collected, amounts to $11,640.50.

2.9 **State Seizure of Colville Cigarettes.** On April 30, 1973, a sealed truck of an interstate commerce carrier enroute to the Colville Indian Reservation, containing unstamped cigarettes, was stopped by agents of the Department of Revenue and its contents were seized, declared contraband, and forfeited pursuant to RCW 82.24.130 and RCW 82.24.350. The wholesale value of the cigarettes, plus the amount of tribal taxes wich would have been collected, amounts to $1,488.00.

2.10 **State Intention to Continue Seizures.** The State of Washington, through its Department of Revenue, has declared its intention to continue such seizures of unstamped cigarettes shipped from outside the State of Washington and destined for Indian reservations in the future.

2.11 **Colville Tobacco Outlets.** The following tobacco outlets are presently licensed by the Colville Business Council pursuant to the Tribal ordinance to sell cigarettes on the Colville Indian Reservation:

1) Dave Roberts
   Smokeshop
   Brewster, Washington

2) Leonard Tonasket
   Stogey Shop
   East Omak, Washington

3) Dawn Leonard
   Widespot Smokeshack
   Coulee Dam, Washington

4) Florence Desautel
   Alpine Smokeshack
   Elmer City, Washington

5) Harry Martin
   Keller Smokeshack
   Keller, Washington

6) Leona Seastrom
Twin Lakes Tavern
Inchelium, Washington

7) Jack Charbonneau
Rainbow Beach Resort
Inchelium, Washington

8) Colville Trading Post
(Tribally Owned)
Nespelem, Washington

9) Watt
Cache Creek Junction Smokeshack
Keller, Washington

10) Cook
Okanogan Smokeshack
Okanogan, Washington

11) North Twin Resort
(Tribally Owned)
Inchelium, Washington

12) Inchelium Community Store
(Tribally Owned)
Inchelium, Washington

13) Nancy Anderson
NC Smokeshack
Bridgeport, Washington

14) Keller Store
(Tribally Owned)
Keller, Washington

The tribal tobacco outlets and the tribal cigarette warehouse employ 53 enrolled members of the Tribe full-time.

2.12 **Colville Tribal Programs.** The Colville Tribes administer tribal governmental programs in many areas including the following:

Revolving Credit Loan Program
Fish and Wildlife Program
Maternal Child Health Program
Community Health Representatives
Range Land Improvement



Timber Stand Improvement
Day Care Center
Alcohol Rehabilitation Program
Housing Improvement Program
Community Centers
Trading Post
Burial Account
Aid to Fire Victims
Tribal Scholarship Program
Paschal Sherman School
Twin Lakes Youth Camp
Parole and Probation Program
Adult Education Program
Employment Assistance Office
Tribal Tribune
Water Inventory
Women and Infant Care
Transportation for the Elderly
Senior Citizens Food Program

2.13 **Colville Tax Revenues.** The Colville Tobacco Enterprise has grossed tax revenues since its inception approximately as follows:

| Year | Revenue |
|---|---|
| 1972 | $ 3,845 |
| 1973 | 64,890 |
| 1974 | 56,913 |
| 1975 | 93,617 |
| 1976 | 140,114 |

Revenues generated in the past have served as needed capital for establishing The Trading Post, a grocery, at Nespelem, on the Reservation. Present plans of the Colville Tribes for use of tribal cigarette tax revenues specifically include the providing of capital for economic enterprises for tribal members, administrative costs of the Paschal Sherman School, assistance programs for post-graduate college training of tribal members and capital for the programs described in Paragraph 2.12 above.

2.14 **Colville Unemployment.** Unemployment on the Colville Indian Reservation is approximately 33% of the available work force. The Colville Business Council is

anxious to take every step to create employment on the Reservation in meaningful tribal enterprises which will result in tribal tax revenues as well.

2.15 **Lummi Tobacco Outlets.** The following tobacco outlets are presently licensed by the Lummi Indian Business Council to sell cigarettes on the Lummi Indian Reservation:

1) Robert Finkbonner
2031 Lummi View Drive
Bellingham, WA 98248

2) Mary Kinley
4373 Lummi Shore Road
Ferndale, WA 98248

3) Ray Morris
1463 Country Lane
Bellingham, WA 98225

4) Henry Hillaire
4895 Ferndale Road
Ferndale, WA 98248

5) Dennis Finkbonner
4595 Sucia Drive
Ferndale, WA 98248

6) Fran James
4339 Lummi Shore Road
Ferndale, WA 98248

The tribal tobacco outlets employ 11 enrolled members of the Tribe full time.

2.16 **Lummi Tribal Programs.** The Lummi Indian Business Council administers tribal governmental programs in many areas including the following:

Health Service Unit
Community Action Program
Alcoholism Program
Services Integration Program
Public Assistance Demonstration Program
Housing Authority
Tribal Administration



Senior Citizens
History and Culture Program
Reservation Planning
Sanitation Engineering Program
Tribal Affairs Management
Day Care Center
Youth Recreation
Criminal Justice and Tribal Court
Legal Assistance
Land Acquisition
Water Rights
Literary Journal
Adult Education
Tribal Training Programs
Mental Health Representative

2.17 **Lummi Tax Revenues.** The Lummi Tobacco Enterprise has grossed tax revenues since its inception as follows:

| Year | Revenue |
|---|---|
| 1973 | $10,274 |
| 1974 | 14,141 |
| 1975 | 17,028 |
| 1976 | 15,000 (estimate) |

The Lummi Indian Tribe is presently dedicated to a program of development of industry on the Reservation and improvement of the economic well-being of its members. Cigarette tax revenues constitute a significant portion of the operating revenues of the Lummi Indian Tribe and are used as operating capital on cost reimbursable programs such as Head Start, child and senior citizen nutrition programs and alcoholism programs. At the present time revenues from the cigarette tax are also used to pay tribal attorney's fees.

2.18 **Makah Tobacco Outlets.** Pursuant to its tribal tobacco ordinance, the Makah Indian Tribe operates only one tribal outlet at the Makah Resort, a resort totally owned and operated by the Makah Indian Tribe on the

Reservation. The operator of the Makah Resort is a salaried employee of the Makah Tribe and the business of the Makah Resort and its tobacco business are totally owned and financed by the Makah Indian Tribe.

2.19 **Makah Tribal Programs.** The Makah Indian Tribe administers tribal governmental programs in many areas including the following:

Juvenile Rehabilitation Center
Sewer System
Probation & Parole
Criminal Justice & Tribal Court
EDA Program Planning
Youth Program
Culture Program
Economic Employment Assistance
701 Planning
Demographic Survey
Community Health Representative
Community Action Program
Title IV
Education
Cemetery and Burial
Fire Department
Sanitation Service
Other Education Programs
Roads and Trail Maintenance
Building Maintenance
Land Purchase
Senior Citizens
Tribal Pier
Fishing Boat Program
Waterfront Development
Television Program
Airport Matching
Tribal Administration

In addition, the Tribe currently has in various stages of proposal and preparation a tribal fish hatchery for



which some federal matching funds have already been received, a local airport, a tribal museum, a fish processing plant, a cannery, a large-scale timber development program utilizing tribal members and a tribal sawmill.

The Makah Tribal Council employs approximately 48 enrolled tribal members in administrative, CAP, Head-start, maintenance, custodial and other positions in the tribal programs.

2.20 **Makah Tax Revenues.** The Makah Tobacco Enterprise has grossed tax revenues since its inception as follows:

| Year | Revenue |
|---|---|
| 1973 | $1,246.00 |
| 1974 | 3,860.00 |
| 1975 | 3,820.00 |
| 1976 | 4,562.00 |

The Makah Tribal Council has depended upon tribal cigarette taxes to provide funds to be used for all tribally administered programs from provision for school lunches for grade school children to scholarship funds for college education for enrolled members.

2.21 **Makah Unemployment.** Unemployment on the Makah Indian Reservation is approximately 60% of the working force. The Makah Tribal Council is anxious to take every step to create employment on the Reservation and needs every possible source of revenue to provide for programs.

2.22 **State Intention to Tax Motor Vehicles, Mobile Homes, Travel Trailers and Campers.** On November 12, 1976 the plaintiff Tribes were advised by Mr. R. H. Munzinger, Senior Assistant Director for Excise Taxes, Washington Department of Revenue, that WAC 458-20-192 (Rule 192) had been adopted by the Department of Revenue on November 12, 1976 and would be used by the Department of Revenue to require the collection of motor vehicle, mobile home, travel trailer and

camper taxes from all Indians residing on any reservations in the State of Washington prerequisite to issuing by the state of licenses, registration, or titles of motor vehicles, mobile homes, travel trailers and campers, whether at the time of the original purchase or later. On November 15, 1976 the plaintiff Tribes were advised by Mr. William Smith, Supervisor of the Use Tax Division, Washington Department of Revenue, that the motor vehicle, mobile home, travel trailer and camper tax rests on the provision provided in Rule 192 that licensing of motor vehicles, mobile homes, travel trailers or campers raises a presumption that they are for use on the highways of the State of Washington.

2.23 **State Licensing Requirements.** The Supreme Court of the State of Washington held in *Makah Indian Tribe v. State*, 76 Wn.2d 485, 457 P.2d 590 (1969) that state jurisdiction and regulatory power extends not only to Washington state highways but to Bureau of Indian Affairs roads inside Indian reservations. Therefore, motor vehicles of the three plaintiff Tribes and their enrolled tribal members may not be used on roads inside the Colville, Lummi and Makah Indian Reservations without being licensed pursuant to state law, and such motor vehicles may not be licensed under Rule 192 without the payment of state tax.

2.24 **Construction and Maintenance of Bureau of Indian Affairs Roads.** The State of Washington neither pays for the construction nor the maintenance of Bureau of Indian Affairs roads. All such roads are constructed and maintained either by the Bureau of Indian Affairs or one of the three plaintiff Tribes within its respective Reservation.

2.25 **Motor Vehicles on the Colville Indian Reservation.** The Colville Indian Reservation comprises 1.3 million acres or approximately 2,000 square miles, and has in excess of 5,000 miles of roads of all types, including state public highways. Total population of the Colville



Indian Reservation, including enrolled tribal members and non-members is 7,027. Approximately 3,200 enrolled tribal members reside on the Reservation. The average Indian household comprises five persons. Since the Reservation is remote, physically isolated and largely undeveloped, most essential goods and services needed by tribal members are located off the reservation and can only be reached by private automobile. Almost every Indian household on the Colville Indian Reservation owns one automobile and a high percentage own a second automobile. The Colville Confederated Tribes itself owns and operates 99 motor vehicles, trailers and trucks which are used in the furtherance of tribal business. Some tribal and individually owned vehicles are used exclusively within the Colville Reservation; some are used partly outside the Colville Reservation.

2.26 **Motor Vehicles on the Lummi Indian Reservation.** The Lummi Indian Reservation comprises 7,319 acres and has 40 miles of roads of all types, including county roads. Approximately 1,250 enrolled tribal members reside on the Lummi Indian Reservation; the average Indian household comprises five persons. Since the greater portion of the Lummi Indian Reservation is located upon a peninsula west of Bellingham, Washington, is isolated and undeveloped, most essential goods and services needed by tribal members are available only off the reservation and require the use of automobiles or other vehicles. Most Lummi Indian households own at least one automobile and many own a second automobile. Some tribal and individually owned vehicles are used within the Lummi Reservation; some are used partly outside the Reservation.

The Lummi Indian Tribe itself owns and operates 31 automobiles, trucks and other vehicles which are used in furtherance of tribal business.

2.27 **Lummi Vehicle License Ordinance.** Plaintiff Lummi Indian Tribe has amended the Lummi Law and Order Code by enacting a vehicle license ordinance on

January 28, 1974 which provides for the exclusive registering and licensing by the Lummi Indian Tribe of all motor vehicles owned, rented or leased by the Lummi Indian Tribe and used exclusively in its service. The Lummi vehicle licensing ordinance provides for payment to the Tribe of an annual license fee of $25.00 per vehicle.

2.28 **Motor Vehicles on the Makah Indian Reservation.** The Makah Indian Reservation comprises approximately 28,000 acres and has 64 miles of roads of various types but has no state highways or county roads.

Total population of the Makah Indian Reservation, including enrolled tribal members and non-members is 1,435; approximately 900 enrolled tribal members reside on the Makah Indian Reservation. The average Indian household comprises five persons. Since the Makah Indian Reservation is located at Neah Bay, Washington, the extreme northwest tip of the Olympic Peninsula, is extremely isolated and relatively undeveloped, most essential goods and services needed by tribal members are located off the reservation and can only be reached by private automobile. At present little or no public transportation is available. A recent public transportation survey indicates that 77% of the 257 Indian households on the Reservation owns one automobile and a high percentage owns a second automobile.

The Makah Indian Tribe itself owns and operates 32 automobiles, trucks and other vehicles which are used in furtherance of tribal business. Some tribal and individually owned vehicles are used exclusively within the reservation; others are used partly outside the Colville Reservation. [*sic*]

2.29 **Mobile Homes on the Colville Indian Reservation.** Indian families live in approximately 100 mobile homes on the Colville Indian Reservation. In addition, approximately 7 Colville families per month purchase mobile homes. The average price per mobile home is $18,000; thus the average state sales tax on the purchase of a mobile home would be $954 for a total of



$6,617 per month for new mobile homes on the Colville Indian Reservation.

2.30 **Mobile Homes on the Lummi Indian Reservation.** Indian familes live in approximately 40 mobile homes on the Lummi Indian Reservation. In addition, approximately 20 Lummi Indian families are in the process of purchasing, or planning to purchase mobile homes. The average price per mobile home is $18,000; thus the average state sales tax on the purchase of a mobile home would be $954 for a total of $19,080 tax on mobile homes that Lummi Indian families presently plan to purchase.

2.31 **Mobile Homes on the Makah Indian Reservation.** Indian families live in approximately 36 mobile homes on the Makah Indian Reservation. In addition, approximately 24 Makah Indian families are in the process of purchasing, or planning to purchase mobile homes. The average price per mobile home is $18,000; thus the average state sales tax on the purchase of a mobile home would be $954 for a total of $22,896 tax on mobile homes that Makah Indian families presently plan to purchase.

2.32 **The Need for Registering and Titling Mobile Homes.** Mobile homes purchased by enrolled tribal members of the three plaintiff Tribes are financed through tribal credit programs, Bureau of Indian Affairs loan programs, or private financial institutions. All three require that the mobile homes be registered and titled under Washington state law and that the lender be shown as a lienholder on the title as a prerequisite to their lending funds for the purchase of the mobile home. Accordingly, Indian families on the three Reservations are unable under Rule 192 to purchase mobile homes without the payment of Washington state mobile home taxes.

2.33 **State.** The State is a sovereign state of the United States. Its tax laws pertaining to cigarettes, tobacco products, and sales of tangible personal property

and services are administered by an agency of the State, the Department of Revenue.

2.34 **Purchase of Cigarettes by Non-members of Tribes.** A majority of the cigarettes and tobacco products sold by licensed tribal tobacco outlets on the three plaintiff Reservations are purchased by non-members of the respective Tribes. No precise figures are available to measure the exact percentage of cigarettes and tobacco products purchased by the members of the Tribe.

2.35 **State Cigarette Tax.** The State cigarette excise tax amounts to $1.60 per carton on cigarettes.

2.36 **Rule 192.** On November 12, 1976, effective December 12, 1976, the State amended its regulations pertaining to state cigarette and sales taxes on sales by licensed Indian retailers of the Tribes to non-members of the Tribes, by adopting WAC 458-12-192 (Rule 192).

2.37 **ETB 504.** On November 24, 1976, the State issued its Excise Tax Bulletin No. 504.08.192, outlining procedures to implement Rule 192 and to provide additional explanation of certain provisions of that administrative rule.

Pursuant to ETB 504 licensed retailers of the Tribes are required to register with the State (without payment of registration fee) and to keep certain records documenting the tax exempt status of sales to members of the three plaintiff Tribes. The following records are required to be kept by all retailers, including licensed retailers of the Tribes.

(a) Name of the Indian purchaser;
(b) The tribal affiliation of the purchaser;
(c) The Indian reservation to which or within which delivery was made, or within which retail services were rendered;
(d) The dollar amount of the sale; and
(e) The date of the sale.



2.38 **State Stamp Requirement.** Tribally-licensed tobacco outlet operators of the Tribes may possess unstamped cigarettes for purposes of resale to members of the three plaintiff Tribes. However, state law provides that at the time of sale of cigarettes and tobacco products to a non-member of the Tribes, the operators must affix state cigarette tax stamps and collect and remit to the State the cigarette and tobacco products excise taxes imposed on the purchaser. The operators may fulfill this stamping responsibility either by: (1) purchasing pre-stamped cigarettes and tobacco products from a wholesaler licensed by the State to affix Washington tax stamps; or (2) purchasing a supply of stamps from the State, in which case the purchase price may be deferred for a period of 30 days upon the posting of a bond in the amount of the purchase price of $2,500, whichever is greater. [*sic*] In the event the operator affixes stamps himself, he will be entitled to compensation at the rate of $1.85 per thousand packs of cigarettes.

2.39 **Refusal of Tribes.** The plaintiff Tribes and their tribally-licensed tobacco outlet operators have never sought the authorization of the State to acquire and possess unstamped cigarettes and tobacco products and they have never requested to be licensed by the State for purposes of sales of cigarettes and tobacco products. The operators of the Tribes have failed and will continue to fail and refuse to affix stamps, or otherwise collect and remit any state cigarette and tobacco products excise taxes imposed on non-members of the Tribes purchasing at retail from such operators.

## 3. PLAINTIFFS' CONTENTIONS.

3.1 A three judge court was properly convened because plaintiffs' complaint seeks to enjoin the enforcement of the state statutes on the ground that they violate the Commerce Clause, Art. I, Sec. 8, the Commerce with the Indian Tribes Clause, Art. I, Sec. 8, the Due Process Clause of the 14th Amendment, and the Equal Protection

Clause of the 14th Amendment of the Constitution of the United States.

3.2 Ch. 240, Laws of 1957, and Ch. 36, Laws of 1963, codified as RCW Ch. 37.12, are invalid in that they violate Public Law 83-280 (67 Stat. 588) and 25 Stat. 676, the enabling act admitting the State of Washington into the Union and are unconstitutional since they violate Article XXVI, Second Section of the Washington State Constitution and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that the Washington State Constitution has never been amended and jurisdiction over Indians and Indian tribes has never validly been assumed by the State of Washington.

3.3 Ch. 36, Laws of 1963, codified as RCW Ch. 37.12 is invalid in that it violates Public Law 83-280 (67 Stat. 588) and 25 Stat. 676, the enabling act admitting the State of Washington into the union and is unconstitutional since it violates Article XXVI, Second Section of the Washington State Constitution and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that it provides for only partial assumption of jurisdiction over Indians and Indian tribes.

3.4 The State of Washington has no authority to enforce state criminal or civil laws against members of the plaintiff Tribes.

3.5 The actions of defendants in enforcing the cigarette tax provisions of RCW Ch. 82.24 as applied to plaintiffs constitute unconstitutional burdens on Indian commerce in violation of Article I, Sec. 8, Cl. 3 of the United States Constitution.

3.6 The actions of defendants in enforcing the cigarette tax provisions of RCW Ch. 82.24 as applied to plaintiffs constitute unconstitutional burdens on Indian commerce in violation of the preemptive right of Congress to regulate this commerce under Article I, Sec. 8, Cl. 3 of the United States Constitution.



3.7 The actions of defendants in enforcing the cigarette tax provisions of RCW Ch. 82.24 as applied to plaintiffs constitute an undue burden on Indian commerce in subjecting it to double taxation in violation of Article I, Sec. 8, Cl. 3 and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

3.8 The actions of defendants in enforcing cigarette tax provisions of Ch. 82.24 RCW, as applied to plaintiffs, constitute violations of the Treaty of Point Elliott, the Treaty with the Makah and the Colville Executive Order of July 2, 1872.

3.9 The actions of defendants in enforcing Ch. 82.24 RCW as applied to plaintiffs constitute unconstitutional burdens on Indian commerce in violation of federal statutes and regulations, including but not limited to 25 U.S.C. §261 *et seq.* and 25 C.F.R. §251 *et seq.* concerning the licensing and regulating of federal Indian traders.

3.10 The actions of defendants in enforcing RCW Ch. 82.24 as applied to plaintiffs constitute unconstitutional interference with the sovereignty of Indian tribes which have preempted the field of cigarette taxation through federally approved tribal ordinances.

3.11 The actions of defendants in enforcing the cigarette tax provisions of RCW Ch. 82.24 as applied to plaintiffs constitute violations of the provisions and policies of the General Allotment Act, 24 Stat. 388 (1887).

3.12 The actions of defendants in enforcing RCW Ch. 82.24 as applied to plaintiffs constitute violations of Public Law 83-280 (67 Stat. 588) by creating encumbrances and taxes on trust and federally restricted Indian property.

3.13 The actions of defendants in enforcing the cigarette tax provisions of RCW Ch. 82.24 as applied to plaintiffs constitute violations of established federal trust policy of insuring maximum profitability of the use of Indian trust land.

3.14 The actions of defendants in enforcing the cigarette tax provisions of RCW Ch. 82.24 as applied to

plaintiffs by stopping and seizing cigarettes destined for Indian tribes, which cigarettes are in licensed, sealed trucks in interstate commerce, constitute unconstitutional burdens on interstate commerce and infringe on the power of Congress to regulate such commerce under Article I, Sec. 8, Cl. 3 of the United States Constitution.

3.15 The actions of defendants in enforcing the cigarette tax provisions of RCW Ch. 82.24 as applied to plaintiffs by seizing plaintiffs' property and interfering with plaintiffs' rights to sell their products freely within the boundaries of their reservation constitute deprivation of plaintiffs' property without due process of law and constitute denial to plaintiffs of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

3.16 An injunction should issue restraining defendants, their agents, employees, servants, officers, successors and all persons in active consort or participation with them from attempting to assess cigarette taxes on sales of cigarettes on plaintiffs' Indian reservations, seizing cigarettes on such reservations or en route to such reservations through the State of Washington, attempting to influence cigarette wholesalers not to sell to plaintiffs and in any way attempting to tax or interfere with the cigarette merchandising activities on plaintiffs' reservations.

3.17 Damages in the amount of $56,118.00 should be awarded to the Colville Confederated Tribes as compensation for cigarettes seized and from related costs and lost tax revenues suffered by plaintiff Colville Confederated Tribes.

3.18 Damages in the amount of $43,662.50 should be awarded as compensation for cigarettes seized and related costs including lost tax revenues suffered by plaintiff Lummi Indian Tribe.

3.19 Damages in the amount of $5,094.00 should be awarded as compensation in lost tax revenues suffered by plaintiff Makah Indian Tribe.



3.20 Plaintiffs should be awarded their costs and reasonable attorneys' fees in this action.

3.21 Since the plaintiff Tribes are immune from suit in federal court without their consent, the court has no jurisdiction to entertain the claims for relief proposed by defendants in their counterclaims or in this pre-trial order.

3.22 The revenues derived by the plaintiff Tribes from their respective cigarette taxing ordinances are an important source of tribal revenue for the conduct of essential tribal governmental programs.

3.23 Under RCW 82.24, the Washington Cigarette and Tobacco Products Tax is levied upon the first taxable event occurring within the State. Taxable events include the handling, distribution and possession of cigarettes, and, under the statute, the interstate transportation of cigarettes by an interstate carrier destined for one of the plaintiff tribes is a taxable event. As a result, the legal incidence of the tax will fall upon the plaintiff tribe or tribal outlet in actual possession of the cigarettes or upon the plaintiff tribe for whom the cigarettes are bound in the stream of interstate commerce.

3.24 The volume of cigarettes sold by the tribal outlets to Indians is less than 10% of the total volume of cigarettes sold. If the state Cigarette and Tobacco Products Tax is enforced against the plaintiff tribes and the tribal outlets, the result will be that the price of cigarettes sold to non-Indians on the reservation by the tribal outlets will be greater than the price of cigarettes sold off the reservation. The practical economic results that will occur if the state Cigarette and Tobacco Products Tax is enforced against the tribes will be: 1) The tribal tobacco enterprises will be operating at a competitive disadvantage to off-reservation sellers and will not be able to survive economically. 2) The plaintiff tribes will no longer be able to generate any tax revenues under their respective cigarette ordinances. 3) Commerce on the Indian reservation between Indian sellers and non-Indian

buyers will be drastically diminished or eliminated on the respective reservations of the plaintiff tribes.

3.25 **Tribal Tax Losses.** As a result of the seizures and threats by the State of Washington, plaintiffs' cigarette sales have been curtailed, and plaintiffs have suffered general losses of tax revenues from June 1972 through December 1973 as follows:

| | |
|---|---|
| Colville Tribes | $54,630.00 |
| Lummi Tribe | $32,022.00 |
| Makah Tribe | $ 5,094.00 |

## 4. ADDITIONAL FACTS.

The parties hereto, by and through their counsel, stipulate and agree that the facts set forth herein are true and correct, and that several documents attached as exhibits hereto are true, accurate, and conformed copies of the originals thereof, and may be received herein without further authentication. Plaintiffs object to admission into evidence of all of the facts set forth herein on the grounds of immateriality and irrelevancy to the issues involved in this action.

4.1 The Colville Reservation has state highways within its exterior boundaries and the Lummi Reservation has county roads within its exterior boundaries. These state highways and county roads are repaired and maintained with state funds.

## 5. DEFENDANTS' CONTENTIONS.

5.1 The State of Washington may require tribally-licensed Indian retailers to collect and remit state excise taxes imposed on non-members of the tribe making purchases of goods and services at retail within the exterior boundaries of plaintiffs' Indian Reservations.

5.2 Washington state sales tax (RCW Ch. 82.08), cigarette tax (RCW Ch. 82.24) and tobacco products tax (RCW Ch. 82.26) are imposed upon non-members of plaintiffs' tribes making purchases of goods and services at



retail within the exterior boundaries of plaintiffs' reservation.

5.3 Washington may adopt and enforce reasonable rules and regulations to enforce state excise tax collection responsibility on retail sales of cigarettes, tobacco products, and goods and services by tribally-licensed retailers of plaintiffs' tribes to non-members of the tribes. The rules and regulations contained in WAC 458-12-192 and E.T.B. 504.08.192 are reasonable and may be enforced against tribally-licensed retailers of plaintiffs' tribes.

5.4 A tribal tax imposed on tribally-licensed Indian retailers of plaintiffs' tribes with respect to sales of cigarettes to non-members of the tribe does not pre-empt a state excise tax imposed upon non-members of the tribe with respect to the same transaction.

5.5 Washington may classify as "contraband" unstamped cigarettes owned by the Tribe and intended for ultimate resale by tribally-licensed retailers to non-members of the tribe in violation of state law, and may seize and sell such cigarettes in the manner prescribed by state law, whether such cigarettes are held on plaintiffs' Indian reservations or are in transit in interstate commerce to plaintiffs' Indian reservations from points outside the state.

5.6 Plaintiff tribes' damages resulting from the seizure and sale of unstamped cigarettes by the state should be limited to the wholesale value of cigarettes, plus applicable tribal tax, reasonably intended for resale to members of plaintiffs' tribes for ultimate consumption. In the absence of records detailing actual sales to members of plaintiffs' tribes, the amount of such cigarettes reasonably intended for resale for ultimate consumption should be determined by reference to tribal membership and average United States per capita consumption of cigarettes in the year in which the cigarettes were seized.

5.7 A reasonable estimate of the amount of state tax loss on sales of cigarettes by plaintiff tribal licensees during the period 1972 through 1976 is as follows:

| | |
|---|---|
| Colville Reservation | — $2,165,214.00 |
| Lummi Indian Reservation | — $2,482,226.00 |
| Makah Indian Reservation | — $ 5,769.00 |

5.8 The state may impose its motor vehicle excise tax (Ch. 82.44), travel trailer and camper excise tax upon vehicles owned by the Tribes or individual members and used on the highways of the State of Washington.

5.9 The court does not have jurisdiction to entertain plaintiffs' claims for relief insofar as such claims pertain to individual members of the tribes, because such persons have an adequate remedy at state law.

## 6. ISSUES OF FACT.

6.1 What would be the economic effect on the plaintiff Tribes, their tribal tobacco enterprises, and the tribally-licensed operators of tribal cigarette outlets of the imposition of both the state cigarette and tobacco products taxes and the tribal cigarette taxes?

6.2 What would be the economic effect on the tribal taxing schemes and tribal self-government of the imposition of both the state cigarette and tobacco products taxes and the tribal cigarette taxes?

6.3 What would be the economic effect on commerce between Indians and non-Indians on the Reservation of the imposition of both the state cigarette and tobacco products taxes and the tribal cigarette taxes?

6.4 What damages have the plaintiff Tribes suffered as a result of the seizures and threatened seizures by the State of Washington from June 1972 through December 1973?

## 7. ISSUES OF FACT-LAW.

Plaintiffs contend that the following questions are questions of mixed fact and law; defendants contend that the following questions are questions of law only.

7.1 **State Tax Burden on Tribes and Operators.** Would the cigarette excise and tobacco products taxes sought to be imposed by the defendants pursuant to RCW Ch. 82.24 to sales of cigarettes and tobacco products by plaintiff Tribes pursuant to their tribal tobacco ordinances impose a direct tax burden upon plaintiff Tribes, their tribal tobacco enterprises or the tribally-licensed operators of tribal cigarette outlets?



7.2 Would the cigarette excise and tobacco products taxes sought to be imposed by defendants pursuant to RCW Ch. 82.24 interfere with the tribal taxing ordinances and interfere with tribal self-government?

7.3 Would the cigarette excise and tobacco products taxes sought to be imposed by the defendants pursuant to RCW Ch. 82.24 interfere with or destroy the tribal tobacco enterprises, interfere with or destroy the existing commerce between Indian retailers and non-Indian buyers on the reservation, and interfere with the economy of the tribes and the reservations?

## 8. ISSUES OF LAW.

8.1 Does the three judge federal district court have jurisdiction pursuant to 28 U.S.C. §2281 on the ground that the complaint seeks to enjoin the enforcement of state statutes on the ground that they are in violation of the Constitution of the United States?

8.2 Has the State of Washington validly assumed jurisdiction over Indian reservations and their enrolled tribal members as provided in Public Law 83-280?

8.3 May the State of Washington apply its cigarette excise and tobacco products tax provisions to cigarette and tobacco products being sold on trust land within the three Reservations of the plaintiff Tribes pursuant to their federally-approved tobacco ordinances?

8.4 May the State of Washington lawfully assess its cigarette excise and tobacco products taxes upon cigarettes and tobacco products being shipped from outside the State of Washington to the Reservations of the three plaintiff Tribes, which cigarette and tobacco products are consigned to the tribal goverments?

8.5 May the State of Washington lawfully seize as contraband cigarette and tobacco products which are being shipped from outside the State of Washington to the Reservations of the three plaintiff Tribes, consigned to the tribal government and intended for resale in tribally licensed tobacco outlets on trust land inside the three Reservations?

8.6 Can the State of Washington lawfully seize and levy upon property of plaintiff Indian Tribes to collect for taxes assessed against plaintiff Indian tribes?

8.7 Do the actions, policies and statutes of the State of Washington regarding cigarette excise taxes, RCW Ch. 82.24 as applied to plaintiffs, violate the United States Constitution, Article I, Sec. 8, Cl. 3, the Fourteenth Amendment to the United States Constitution, the laws of the United States, and in particular Title 25 of the U.S. Code, the Treaty of Point Elliott, the Treaty with the Makah, the Colville Executive Order of July 2, 1872, the sovereignty of plaintiff Tribes, the General Allotment Act of 1887, Public Law 83-280 and federal trust policy?

8.8 Is the State of Washington liable for damages suffered by plaintiff Tribes as a result of the seizure of cigarettes and interference with tribal cigarette sales programs?

8.9 Does RCW Ch. 82.24 cause the legal incidence of the cigarette excise and tobacco products taxes to fall upon the plaintiff Tribes, the tribal outlet operators, or upon the ultimate non-Indian consumer?

8.10 In view of the immunity from suit of the three plaintiff Tribes, may the State of Washington attempt to seek relief against the plaintiff Tribes without their consent?

8.11 May the State of Washington impose its motor vehicles excise tax, RCW Ch. 82.44 and its travel trailer and camper excise tax, RCW Ch. 82.50, upon motor vehicles, travel trailers and campers owned by plaintiff Tribes and their enrolled tribal members resident upon their respective reservations?



8.12 May the State of Washington impose its sales and use taxes, RCW Ch. 82.08 and RCW Ch. 82.12, upon mobile homes located on the reservation and owned by plaintiff Tribes and their enrolled tribal members resident upon their respective reservations?

8.13 Does 28 U.S.C. §1341 bar this court from granting declaratory or injunctive relief with respect to tax claims of individual Indians?

## 9. ADDITIONAL ISSUE OF LAW.

The complaint raises the question whether the State's assumption of jurisdiction in RCW Ch. 37.12 over Indian reservations in Washington is valid. Although plaintiffs seek an injunction against the State's exercise of jurisdiction over the Reservations, it appears that no three judge panel is required. See *Moe v. Confederated Salish and Kootenai Tribes,* ____ U.S. ____, 48 L.Ed.2d 96, 111 n. 17 (1976). Thus, the following issue concerning the district court's jurisdiction has arisen:

May the District Court judge member of the three-judge court, hear and consider on the merits an issue of law raised in the complaint which does not require determination by a three judge court under 28 U.S.C. §2281?

## 10. EXHIBITS.

The following exhibits were produced and may be received in evidence if otherwise admissible, without further authentication, it being admitted that each is what it purports to be:

**Plaintiffs' Exhibits:**

10.1 Constitution and By-Laws of the Confederated Tribes of the Colville Reservation, approved February 26, 1938.

10.2 Constitution and By-Laws of the Lummi Indian Tribe, approved April 10, 1970.

10.3 Constitution and By-Laws of the Makah Indian Tribe, approved May 16, 1936.

10.4 Letter of October 26, 1972 from Area Director of Bureau of Indian Affairs to Superintendent of Colville Indian Agency, approving Colville Tobacco Ordinance, with copy of Ordinance attached.

10.5 Letter of November 8, 1972 from Area Director of Bureau of Indian Affairs to Superintendent of Western Washington Indian Agency, approving Lummi Tobacco Ordinance, with copy of Ordinance attached.

10.6 Letter of April 7, 1972 from Superintendent of Western Washington Indian Agency to Chairman of Makah Indian Tribe, approving Makah Tobacco Ordinance, with copy of Ordinance attached. (On January 18, 1973, the Makah Tobacco Ordinance was amended to restrict tobacco outlets to trust land, to ensure that all purchases made by the Tribe are made with federally-restricted tribal funds and to prohibit sales of tobacco products to persons under the age of 18 years.)

10.7 Federal Trader's Licenses issued to Collins and Wilmes Cigar Company for sales to tribes on reservations.

10.8 Colville Tobacco Ordinance, as amended, Resolution 1974-565, dated August 23, 1974.

10.9 Makah Tobacco Ordinance, as amended, Resolution 13-75, August 22, 1974.

10.10 Lummi Tobacco Ordinance, as amended, Resolution S-3, Ordinance L-40, August 30, 1974.

10.11 Lummi Code of Laws, Ch. 6.11 Vehicle Licenses (Lummi Vehicle Licensing Ordinance).

**Defendants Exhibits:**

(1) WAC 458-12-192
(2) ETB 504.08.192

## 11. ACTIONS OF THE COURT.

11.1 On November 5, 1973, this Court issued a Temporary Restraining Order enjoining the State of Washington and its agents and employees from enforcing its statutes and regulations concerning cigarettes destined for plaintiff Tribes, transported by licensed carriers in interstate commerce, and their possession, distribution and ultimate retail sale through tribal tobacco outlets on trust lands inside their respective reservations pursuant to their respective tribal cigarette ordinances.



11.2 On September 6, 1974, this Court issued a Preliminary Injunction enjoining the State of Washington and its agents and employees from enforcing its statutes and regulations concerning cigarettes destined for plaintiff Tribes, transported by licensed carriers in interstate commerce, and their possession, distribution and ultimate retail sale through tribal tobacco outlets on trust lands inside their respective reservations pursuant to their respective tribal cigarette ordinances.

It is hereby ordered that the foregoing constitutes the Pre-Trial Order in the above-entitled cause and that upon the filing hereof the pleadings pass out of the case and are superseded by this order, which shall not be amended, except by consent of the parties, or by order of the court to prevent manifest injustice.

DATED this 28th day of March, 1977.

/s/_____
John F. Kilkenny
UNITED STATES CIRCUIT COURT

* * * *

EXHIBIT 10.1 [to Pre-Trial Order]

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

*

# CONSTITUTION AND BY-LAWS
OF THE
# CONFEDERATED TRIBES
# OF THE COLVILLE RESERVATION

*

APPROVED FEBRUARY 26, 1938

* * *

## CONSTITUTION AND BY-LAWS
OF THE
## CONFEDERATED TRIBES
## OF THE COLVILLE RESERVATION DIGEST

## P R E A M B L E


ARTICLE I PURPOSE

ARTICLE II GOVERNING BODY

**Sections**

1. Name
2. Councilmen Number
3. Representation from Districts
4. Power to Change Districts and Representation
5. Officers
6. Candidate Qualifications
7. Council Sole Judge of its Members

ARTICLE III NOMINATIONS AND ELECTIONS

**Sections**

1. First Election and Terms of Office
2. Rules for Election





3. Candidate Procedures
4. Certification of Election
5. Qualifications for Voters

ARTICLE IV VACANCIES AND REMOVAL FROM OFFICE

**Sections**

1. Regulations to fill vacated position (amended)
2. To Expel Councilman
3. Petition to Recall

ARTICLE V POWERS AND DUTIES OF THE COUNCIL

1. Powers and Duties
   Uses of tribal property, protection, preservation of wildlife and natural resources, promulgate and enforce ordinances, etc.

ARTICLE VI AMENDMENTS TO CONSTITUTION


## CONSTITUTIONAL AMENDMENTS

**Amendments:**


No.

1. Time and Place of Meetings, Procedures
2. Vacancies and Removals from Office
3. Membership

**Sections**

1. Provisions governing membership
   (a) All persons whose names appear on January 1, 1937 Census Roll.
   (b) All children born after January 1, 1937.
   (c) All children born after January 1, 1937, whose parents reside off reservation.
2. Power to prescribe rules and regulations
   (a) Approval by Secretary of the Interior
   (b) One-fourth degree Indian blood adoption requirement
   (c) Loss of membership, Alien Indians

4. Vacancies and Removal from Office
5. After July, 1959, ¼ degree Colville Indian blood requirement.

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## BY-LAWS OF THE CONFEDERATED TRIBES

ARTICLE I THE BUSINESS COUNCIL

**Sections**

1. Chairman, authority, tie vote, etc.
2. Vice Chairman, duties
3. Secretary, duties
4. Appointive Officers

ARTICLE II TIME AND PLACE OF MEETINGS AND PROCEDURE

**Sections**

1. Regular meeting schedule, special meetings
2. Quorum
3. Order of Business
4. Reports of meeting by Councilman

ARTICLE III RATIFICATION OF CONSTITUTION AND BY-LAWS

## CONSTITUTION AND BY-LAWS OF THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

### P R E A M B L E

We, the people of the Colville Reservation in the State of Washington, in order to form a recognized representative council to handle our Reservation affairs, and in order to improve the economic condition of ourselves and our posterity, do hereby establish this Constitution and By-Laws.

### ARTICLE I — PURPOSE

The object and purpose shall be to promote and protect the interests of the Colville Indians and to



preserve peaceful and cooperative relations with the Office of Indian Affairs, its officers and appointees.

### ARTICLE II — GOVERNING BODY

*Section* 1. The governing body of the Confederated Tribes of the Colville Reservation shall be a council known as the Colville Business Council.

*Section* 2. The Business Council shall consist of fourteen (14) Councilmen to be elected from the districts as set forth hereafter.

*Section* 3. The representation from the districts hereby designated shall be as follows: Inchelium district, four councilmen; Nespelem district, four councilmen; Omak district, four councilmen; Keller district, two councilmen.

*Section* 4. The Business Council shall have the power to change the districts and the representation from each district based upon community organization or otherwise, as deemed advisable, such change to be made by ordinance, but the total number of councilmen shall not be changed, as provided for in Section 2 of Article II of this Constitution.

*Section* 5. The Business Council so organized shall elect from within its own number (1) a chairman; (2) a vice-chairman; and from within or without its own membership (3) a secretary; and may appoint such other officers and committees as may be deemed necessary.

*Section* 6. No person shall be a candidate for membership in the Business Council unless he shall be a member of the Confederated Tribes of the Colville Reservation and shall have resided in the district of his candidacy for a period of one year next preceding the election, and be at least twenty-five (25) years of age.

*Section* 7. The Business Council of the Confederated Tribes of the Colville Reservation shall be the sole judge of the qualifications of its members.

### ARTICLE III — NOMINATIONS AND ELECTIONS

*Section* 1. The first election of the Business Council

under this Constitution shall be called, held and supervised by the Superintendent of the Reservation and the delegates who were selected by the Districts and who prepared this constitution, within sixty days after its ratification and approval.

At the first election, the two candidates receiving the highest number of votes in the Inchelium, Nespelem, and Omak districts shall serve two years; the candidate receiving the highest number of votes in the Keller district shall serve two years. The two candidates receiving the next highest number of votes in the Inchelium, Nespelem, and Omak districts shall serve one year; and the candidate receiving the next highest number of votes in the Keller district shall serve one year. Thereafter, elections for the Business Council shall be held every year and shall be called at least sixty days before expiration of the terms of office.

The terms of office of a councilman shall be for a period of two years, unless otherwise provided herein.

*Section* 2. The Business Council, or an election board appointed by the Council, shall determine rules and regulations governing all elections.

*Section* 3. Any qualified member of the Confederated Tribes may announce his candidacy for the Business Council within the district of his residence, in accordance with Section 6 of Article II.

*Section* 4. The Business Council, or a board appointed by the Business Council, assisted by the Superintendent of the Reservation, shall certify to the election of the Business Council members within five days after election returns.

*Section* 5. Any enrolled member of the Confederated Tribes of the Colville Reservation who is twenty-one (21) years of age or over shall be entitled to vote.

ARTICLE IV — VACANCIES AND REMOVAL FROM OFFICE

*Section* 1. If a councilman or official shall die, resign, be removed or recalled from office, permanently leave the Reservation, or shall be found guilty of a felony or



misdemeanor involving dishonesty in any Indian, State, or Federal Court, the Business Council shall declare the position vacant and the district affected shall elect to fill the unexpired term. *(This Section amended. See Amendment II)*

*Section* 2. The Business Council may by majority vote expel any member for neglect of duty or gross misconduct. Before any vote for expulsion is taken in the matter, such member or official shall be given a written statement of the charges against him at least five days before the meeting of the Business Council before which he is to appear, and he shall be given an opportunity to answer any and all charges at the designated Council meeting. The decisions of the Business Council shall be final.

*Section* 3. Upon receipt of a petition signed by one-third (1/3) of the eligible voters in any district calling for the recall of any member of the Council representing said district, it shall be the duty of the Council to call an election on such recall petition.

No members may be recalled in any such election unless at least 40% of the legal voters of the district shall vote in such election. *(This Section amended. See Amendment IV).*

ARTICLE V — POWERS AND DUTIES OF THE COUNCIL

*Section* 1. The Business Council shall have the following powers, subject to any limitations imposed by the Statutes or the Constitution of the United States, and subject to all express restrictions upon such powers contained in this Constitution and attached By-Laws;

(a) To confer with the Commissioner of Indian Affairs or his representatives and recommend regarding the uses and disposition of tribal property; to protect and preserve the Tribal property, wildlife and natural resources of the Confederated Tribes, to cultivate Indian Arts, crafts, and culture; to administer charity, to protect the health, security, and general welfare of the Confederated Tribes.

(b) To exclude from the restricted lands of the Reservation persons not legally entitled to reside thereon,

under ordinances which may also be subject to review by the Secretary of the Interior.

(c) To recommend and help to regulate the inheritance of real and personal property, other than allotted lands, within the Colville Reservation.

(d) To regulate the domestic relations of members of the Confederated Tribes.

(e) To promulgate and enforce ordinances, subject to review by the Secretary of the Interior, which would provide for assessments or license fees upon non-members doing business within the Reservation, or obtaining special rights or privileges, and the same may be applied to members of the Tribes provided such ordinances have been approved by a referendum of the Confederated Tribes.

### Article VI — Amendments

This Constitution and By-Laws may be amended by a majority of the qualified voters of the Confederated Tribes voting at an election called for that purpose. Provided, that the Tribal Council shall have adopted the amendment by a two-thirds (2/3) vote, but no amendment shall become effective until it shall have been approved by the Commissioner of Indian Affairs.

## CONSTITUTIONAL AMENDMENTS

### Amendment I

Article II, Section 1, By-law: Time and Place of Meetings and Procedure. — Regular meetings of the Business Council shall be held on the second Thursday of July, October, January and April, at Nespelem, Washington, at a designated building or hall. *(Adopted by Confederated Tribes, June 15, 1946. Approved by Acting Commissioner of Indian Affairs May 8, 1947.)*

### Amendment II

Article IV, Section 1. Vacancies and Removal From Office. — If a councilman or official shall die, resign, be removed or recalled from office, permanently leave the reservation, or shall be found guilty of a felony or misdemeanor involving dishonesty in any Indian, State of Federal court, the Business Council shall declare the position vacant and appoint a member from the district affected to fill the unexpired term. *(Adopted by Confederated Tribes June 15, 1946. Approved by Acting Commissioner of Indian Affairs May 8, 1947.)*



### Amendment III

Article VII, Membership of the Confederated Tribes of the Colville Reservation. — There shall be added a new provision governing membership of the Confederated Tribes of the Colville Reservation which shall read as follows:

*Section* 1.—The membership of the Confederated Tribes of the Colville Reservation shall consist of the following:

(a) All persons of Indian blood whose names appear as members of the Confederated Tribes on the official census of the Indians of the Colville Reservation as of January 1, 1937, provided that, subject to the approval of the Secretary of the Interior corrections may be made in said roll within two years from the adoption and approval of this amendment.

(b) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Confederated Tribes of the Colville Reservation maintaining a permanent residence on the Colville Indian Reservation.

(c) All children possessing one-fourth or more Indian blood, born after January 1, 1937, to any member of the Confederated Tribes of the Colville Reservation maintaining residence elsewhere in the continental United States, provided that the parent or guardian of the child indicate a willingness to maintain tribal relations and to participate in tribal affairs. To indicate such willingness to maintain tribal affiliation, the parent or guardian shall, within six months after the birth of the child submit a written application to have the child enrolled. The application

shall be accompanied by the child's birth certificate together with any other evidence as to the eligibility of the child for enrollment in the Confederated Tribes of the Colville Reservation. If the certificate and application are not filed within the designated time, the child will not be enrolled.

*Section* 2. The Business Council of the Confederated Tribes shall have power to prescribe rules and regulations governing future membership in the tribes, including the adoption of members and loss of membership, provided:

(a) That such rules and regulations shall be subject to the approval of the Secretary of the Interior.

(b) That no person shall be adopted who possesses less than one-fourth degree Indian blood.

(c) That any member who takes up permanent residence or is enrolled with a tribe, band or community of foreign Indians shall lose his membership in the Colville Tribes.

Alien Indians may be deleted from the rolls after they have been given an opportunity to be heard in their own behalf. The tribe shall also take appropriate action to correct the existing tribal roll and, if necessary, delete from the rolls alien Indians whose names appear on the rolls of the Confederated Tribes and who have abandoned tribal relations. The Colville Confederated Tribes shall not deprive anyone of vested property rights, such as allotments or inherited interests. *(Adopted by Confederated Tribes May 20, 1949. Approved by Commissioner of Indian Affairs April 14, 1950.)*

## Amendment IV

That Section 3, of Article IV, Vacancies and Removal from Office, is hereby amended to read:

*Section* 3. By the eligible voters of any district filing with the Colville Business Council a typewritten or printed petition, signed by at least one-third (1/3) the number of those who were eligible to vote in the last preceding election, charging that a council member



representing such district has violated his oath of office or committed an act or acts of malfeasance, or an act or acts of misfeasance while in office, a demand may be made for a recall of such council member provided the act or acts complained of are set forth in concise language and the signature of each petitioner has alongside it those of two witnesses thereto and the petitioner's post office address.

The Council shall, at its next meeting after the filing of such petition, determine whether the petition as filed meets the requirements of this section of the Constitution and if it finds that such requirements have been complied with, shall call a special election on such recall petition, said election to be held not sooner than 30 days after the action of the Council on the petition nor more than 60 days after the date of such Council action.

The ballot to be voted on at such special election shall contain the charging part of the petition hereinabove referred to.

No member may be recalled at any such election unless at least forty percent (40%) of the eligible voters of the district shall have voted at such election and unless a majority of those voting vote in favor of recall. *(Adopted by Confederated Tribes May 9, 1959. Approved by Acting Commissioner of Indian Affairs July 2, 1959.)*

## Amendment V

There shall be added to Amendment III, Membership of the Confederated Tribes of the Colville Reservation, a new provision governing membership of the said tribes which shall read as follows:

*Section* 3. After July 1, 1959, no person shall be admitted to membership in the Confederated Tribes of the Colville Reservation unless such person possesses at least one-fourth (1/4) degree blood of the tribes which constitute the Confederated Tribes of the Colville Reservation. *(Adopted by the Colville Confederated Tribes on May 9, 1959. Approved by the Acting Commissioner of Indian Affairs July 2, 1959.)*

# BY-LAWS OF THE CONFEDERATED TRIBES

## ARTICLE I — THE BUSINESS COUNCIL

*Section* 1. *Chairman of the Business Council.* The Chairman of the Business Council shall preside over all meetings of the Business Council. He shall perform all duties of the Chairman and exercise authority delegated to him by the Business Council. He shall vote only in the case of a tie.

*Section* 2. *Vice-Chairman of the Business Council.* The Vice-Chairman of the Business Council shall assist the Chairman when called upon to do so. In the absence of the Chairman, he shall preside. When so presiding, he shall have all the rights, privileges and duties, as well as the responsibilities of the Chairman.

*Section* 3. *Secretary of the Business Council.* The Secretary of the Business Council shall conduct all correspondence and keep a complete and accurate record of all matters transacted at Council Meetings. It shall be his duty to submit promptly to the Superintendent of the jurisdiction copies of all minutes of regular and special meetings of the Business Council and the Tribes.

*Section* 4. *Appointive Officers.* The duties of all appointive committees and officers appointed by the Colville Business Council shall be clearly defined by resolution of the Business Council at the time of their creation or appointment. Such committees and officers shall report from time to time as required, to the Business Council, and their activities and decisions shall be subject to review by the Business Council upon petition of any person aggrieved.

## ARTICLE II — TIME AND PLACE OF MEETINGS AND PROCEDURE

*Section* 1. Regular meetings of the Business Council shall be held on the second Friday of July, October, January and April, at Nespelem, Washington, at a designated building or hall. *(This section amended. See Amendment I.)*



Special meetings may be called by written notice signed by the Chairman or by a majority of the Business Council members, and when so called the Business Council shall have power to transact business as in regular meetings.

*Section* 2. — *Quorum.* No business shall be transacted unless a quorum is present. A quorum shall consist of eight (8) councilmen.

*Section* 3. — *Order of Business.* The following order of business is established for all meetings:

1. Call to order by the Chairman.
2. Roll call.
3. Ascertainment of a Quorum.
4. Reading of the minutes of the last meeting.
5. Adoption of the minutes by a vote or common consent.
6. Unfinished business.
7. New Business.
8. Adjournment.

*Section* 4. — *Report of Meetings.* It shall be the duty of each member of the Business Council to make reports concerning the proceedings of the Business Council to the members of the district from which he is elected.

## ARTICLE III — RATIFICATION OF CONSTITUTION AND BY-LAWS

This Constitution and By-Laws shall be in full force and effect whenever a majority of the adult voters of the Confederated Tribes voting at an election called by the Commissioner of Indian Affairs, in which at least thirty percent (30%) of the eligible voters vote, shall have ratified such Constitution and By-Laws and the Commissioner of Indian Affairs shall have approved same.

## CERTIFICATION OF ADOPTION

Pursuant to the request of a majority of the Indians of the Colville Reservation to obtain for themselves a representative organization, this Constitution and By-Laws was duly submitted by the Commissioner of Indian

Affairs to the adult Indians living on the Reservation for ratification and was on February 26, 1938, duly ratified by a vote of 503 for, and 76 against, in an election in which over 30 percent of those entitled to vote cast their ballots.

| | |
|---|---|
| /Signed/ Harvey K. Meyer | /Signed/Gus Whitelaw |
| Superintendent, Colville Agency | Chairman, Constitutional Committee |

APPROVAL

This Constitution and Bylaws, having been proposed and duly ratified by the Indians of the Colville Reservation on February 26, 1938, at a referendum called by me, is herewith approved.

/signed/ John Collier

Commissioner of Indian Affairs

Washington, D.C.
April 19, 1938

This is a true and correct copy of the Constitution and By-Laws of the Confederated Tribes of the Colville Reservation. Issued: August 1, 1967

/signed/ Harry Owhi

Executive Secretary



**EXHIBIT 10.2 [to Pre-Trial Order]**

# CONSTITUTION AND BYLAWS OF THE LUMMI TRIBE OF THE LUMMI RESERVATION, WASHINGTON

## Preamble

We, the members of the Lummi Tribe of Indians of the Lummi Reservation in the State of Washington, in order to make the tribal government, established by the constitution and bylaws approved April 2, 1948, more responsive to the tribe, to develop our community resources, administer justice, protect our tribal interests, and promote the economic and social welfare of ourselves and our descendants, and to preserve our land base, culture, and identity, do hereby establish this constitution and bylaws, which shall revoke and replace said constitution and bylaws approved April 2, 1948, and shall henceforth constitute the governing document of the Lummi Tribe.

## Article I—Territory

The jurisdiction of the Lummi Tribe shall extend to the territorial boundaries of the Lummi Reservation as established by the Treaty of January 22, 1855, and by Executive Order of November 11, 1873, and to such other lands as may be hereafter added thereto. However, nothing in this article shall be construed as restricting the treaty hunting and fishing rights of members, including the right to hunt and fish in usual and accustomed places.

## Article II—Membership

Section 1. The membership of the Lummi Tribe shall consist of the following:

(a) All persons of Indian blood whose names appear

on the Official Census Roll of the Tribe as of January 1, 1942, provided that such roll may be corrected by the Lummi Business Council with the approval of the Commissioner of Indian Affairs.

(b) Any persons of Indian blood who were residents of the reservation on January 1, 1947, and whose names would have been placed on a census roll of that date had one been prepared.

(c) All other persons of Indian blood resident on the reservation at any time between January 1, 1942, and the effective date of this constitution, who were accepted by the general council as members of the Lummi Tribe.

(d) All children born between January 1, 1942, and the effective date of this constitution, to any member of the tribe who was living on the Lummi Reservation at the time of the birth of said child.

(e) All children of one-fourth (¼) degree or more Indian blood born between January 1, 1942, and the effective date of this constitution, to any member of the tribe not living on the reservation at the time of the birth of said child.

(f) All children of one-fourth (¼) degree or more Indian blood born to any member of the tribe after the effective date of this constitution.

SEC. 2. The Lummi Business Council shall have the power to pass ordinances subject to the approval of the Commissioner of Indian Affairs, governing future membership, abandonment of membership, and the adoption of new members, provided that all adoptions must be approved by the general council.

## ARTICLE III—GENERAL COUNCIL

SECTION 1. *The general council* shall consist of the entire voting membership of the Lummi Tribe when it is convened officially for official business. The annual general council meeting shall be called during the first week of January, provided that special meetings shall be



called by majority vote of the business council or upon the request, in writing, of twenty voting members of the tribe. Public notices of all special general council meetings shall be made at least ten (10) days prior to such meetings. It shall also be the duty of the chairman to make a report at the annual general council meeting of the activities of the business council throughout the past year and to outline proposed plans for future economic and social betterment of the tribe.

SEC. 2. *Voter Qualifications.* Any member of the Lummi Tribe, twenty-one (21) years of age, or over, who has maintained legal residence on the reservation or within the boundaries of Whatcom County, Washington, for at least six (6) months immediately preceding any election, shall be qualified to vote on all matters before the general council meetings.

SEC. 3. *The duties of the general council* shall consist of, but need not be limited to the following:

(a) Act on all adoptions recommended by the business council, as provided in Section 2, Article II of this constitution;

(b) Review the actions of the business council at the annual meeting;

(c) Recommend actions to be taken by the business council;

(d) Appoint a committee to certify all elections to the business council;

(e) Consider the recall of members of the business council, as provided in Section 2, Article V, and consider all referendums, as provided in Article VII of this constitution.

## ARTICLE IV—GOVERNING BODY

SECTION 1. *The governing body* of the Lummi Tribe shall be a business council consisting of eleven (11) members duly elected to serve for a three-year term, as provided in Section 4 of this Article, provided that a

minimum of seven (7) members must live on the reservation.

SEC. 2. *Qualifications.* Any eligible voter shall be qualified to serve as a member of the Lummi Business Council, provided that he has been living within the boundaries of Whatcom County, Washington for at least one (1) year immediately preceding any election, and complies with Section 1 of this Article.

SEC. 3. *Selection of Officers.* The business council so organized shall, on a yearly basis, elect from within its own number: (1) a chairman, (2) a vice-chairman, (3) a secretary, and (4) a treasurer, and may appoint or employ such other officers or committees as may be necessary.

SEC. 4. *Election of Business Council Members.* After the ratification and approval of this constitution and bylaws, the first business council under this constitution shall be the council existing under the 1948 constitution. Members of that body shall draw lots in order that the terms of office of the present members can be determined for one, two, or three years, and thereafter an election shall be held at the next regular general council meeting for the positions held by the three councilmen who drew the one-year lots, with an election of these three positions every three years thereafter. In the other years, four councilmen shall be elected at the regular general council meeting, first for the positions held by the four councilmen who drew the two-year lots and then for he positions held by the four councilmen who drew the three-year lots.

## ARTICLE V—VACANCIES AND RECALL

SECTION 1. *Vacancy.* If any member of the business council shall die, resign, or move outside the boundaries of Whatcom County, or shall be found guilty of a felony, or a misdemeanor involving dishonesty in any Indian, State, or Federal court, a vacancy in his office shall automatically be created, and at its next regular or special meeting, the



business council shall appoint a person qualified pursuant to Article IV to fill the office until the next annual general council meeting, at which time a successor shall be elected pursuant to Article IV, to fill the office for the balance of the unexpired term, provided that whether vacancies are filled by appointment or election, the number of council members required to live on the reservation pursuant to Section 1, Article IV, shall be maintained.

If a business council member changes his residence from the reservation to elsewhere within Whatcom County during his term of office, and if such move results in less than the number of business council members required to live on the reservation by Section 1, Article IV, that council member's position shall automatically become vacant and shall be filled pursuant to this section.

SEC. 2. *Recall.* The members of the general council shall have the power to initiate recall of any member of the business council by filing a petition with the secretary of the business council, signed by at least twenty-five percent (25%) of the number of those voting at the last regular general council meeting, asking for the recall of said member of the business council; or, the business council may, by majority vote, initiate recall of any councilman for neglect of duty or gross misconduct, provided that in neither procedure shall a person be recalled except at a special meeting of the general council called for that purpose within thirty days after the business council action or the filing of the voter petition, provided that he shall be given in writing a statement of the charges against him at least ten (10) days prior to the general council meeting, provided further, that he shall be given an opportunity to answer any and all charges. A two-thirds (⅔) majority vote of those attending the meeting shall be required to effect recall. The general council's decision shall be final.

SEC. 3. *Unexcused Absence.* Any councilman who shall absent himself from three (3) successive meetings

without being excused for cause, shall forfeit all rights to his office.

## Article VI—Powers and Duties of the Business Council

Section 1. The Lummi Business Council shall have the following powers, subject to any limitation imposed by Federal statutes or by the Constitution of the United States:

(a) To administer all tribal property and assets, by ordinance where required;

(b) To borrow money from the Federal Government, or other sources, and to direct the use of such funds for productive purposes, or loan money to members of the Lummi Tribe, as defined in Article II;

(c) To collect and expend any Lummi tribal funds within the exclusive control of the tribe, and to recommend the expenditure of any other tribal funds;

(d) To purchase or lease in the name of the Lummi Indian Tribe any land or other property the council may deem beneficial to said Lummi Tribe;

(e) To enforce regulations contained in approved tribal resolutions and ordinances for the protection of tribal property, fish and wild life, and other natural resources of the Lummi Tribe;

(f) (1) To levy assessments or license fees on nonmembers doing business or obtaining special privileges within the reservation, subject to the approval of the Commissioner of Indian Affairs.

(2) To promulgate rules and regulations and enforce assessments or license fees on members exercising special privileges or profiting on general resources from tribal property;

(g) To negotiate with the Federal, State, and local governments on behalf of the tribe;



(h) To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Commissioner of Indian Affairs;

(i) To prevent the sale of tribal lands or interests in tribal lands without the consent of the general council;

(j) To exclude from the restricted land of the Lummi Reservation persons not legally entitled to reside therein, under ordinances which shall be subject to the approval of the Commissioner of Indian Affairs;

(k) To promulgate and enforce ordinances, which shall be subject to the approval of the Commissioner of Indian Affairs, governing the conduct of members of the Lummi Tribe, and providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers;

(l) To safeguard and promote the peace, safety, morals, and general welfare of the Lummi Reservation by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that ordinances directly affecting nonmembers of the tribe shall be subject to approval of the Commissioner of Indian Affairs;

(m) To adopt resolutions regulating the procedure of the business council itself and subordinate tribal organizations, and tribal officials over whom it has jurisdiction;

(n) To promote public health and education, encourage Indian handicrafts, the administration of charity, the conservation and utilization of natural resources, and such other services which may contribute to the social advancement of the tribe;

(o) To make rules and procedures not inconsistent with the provisions of this constitution governing all tribal elections, which shall, among other things, provide for secret balloting;

(p) To delegate to subordinate boards or to cooperative associations which are open to all members of the tribe, any of the foregoing powers, reserving

the right to review any action taken by virtue of such delegated powers, provided that all final action must be taken by the business council.

SEC. 2. *Future Powers.* The Lummi Business Council may exercise such further powers as may, in the future, be delegated to the business council.

SEC. 3. *Reserved Powers.* Any rights and powers heretofore vested in the tribe but not expressly referred to in this constitution shall not be abridged by this article, but may be exercised by the people of the Lummi Reservation through the adoption of appropriate bylaws and constitutional amendments.

## ARTICLE VII—REFERENDUM

Upon receipt of a petition of at least twenty-five percent (25%) of the voting membership of the tribe, or upon the request of the majority of the full membership of the business council, the chairman shall call a special meeting of the general council to be held within thirty (30) days of receipt of such petition or request, to consider any enacted or proposed ordinances or resolutions, and the vote of the majority of the voting membership attending the special meeting will decide whether the enacted or proposed ordinances or resolutions shall thereafter be in effect, provided that twenty-five percent (25%) or more of the eligible voters shall vote in such referendum. Public notices of all special meetings shall be made in accordance with Section 1, Article III.

## ARTICLE VIII—BILL OF RIGHTS

All members of the Lummi Indian Tribe shall be accorded equal rights pursuant to tribal law. No member shall be denied any of the rights or guarantees enjoyed by non-Indian citizens under the Constitution of the United States, including, but not limited to, freedom of religion and conscience, freedom of speech, the right to orderly association or assembly, the right to petition for action or



the redress of grievances, and due process of law. No member shall be denied any of the rights or guarantees as provided in Title II of Public Law 90-284 — the Act of April 11, 1968 (82 Stat. 77 and 78) as follows:

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or *ex post facto* law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

### ARTICLE IX—AMENDMENTS

This constitution and bylaws may be amended by a two-thirds (⅔) vote of those voting at an election authorized for that purpose by the Commissioner of Indian Affairs, provided that at least thirty percent (30%) of those entitled to vote shall vote in such an election. No amendment shall become effective until it shall have been approved by the Commissioner of Indian Affairs.

It shall be the duty of the Commissioner of Indian Affairs to authorize an election upon presentation of a request by a two-thirds (⅔) vote of the members of the business council present at a duly convened meeting or upon receipt of a petition signed by thirty (30) eligible voters of the tribe.

## BYLAWS OF THE LUMMI TRIBE

### ARTICLE I—THE BUSINESS COUNCIL

SECTION 1. *The chairman* of the business council shall preside over all business and general council meetings of the tribe. He shall be allowed to vote only in case of a tie. He shall exercise any authority specifically delegated to him by the business council.

SEC. 2. *The vice-chairman* of the business council shall assist the chairman when called upon to do so. In the absence of the chairman, he shall preside, and when so presiding, have all the rights, privileges, and duties, as well as the responsibilities, of the chairman.

SEC. 3. *The secretary* shall prepare all tribal correspondence and shall not sign notices or documents



unless authorized by the business council. It shall be the duty of the secretary to keep a complete and accurate record of all matters transacted at council meetings and to submit copies of minutes of all meetings of the business council and general council to the Western Washington Agency.

SEC. 4. *The treasurer* shall have custody of and be responsible for all funds in the custody of the business council. The treasurer shall deposit all such funds in such federally insured banks or elsewhere as directed by the business council and shall keep proper records of such funds. The treasurer shall report on all receipts and expenditures and the amount and nature of all funds on hand at the annual general council meeting and upon request of the business council. The treasurer shall not pay out any funds except when authorized to do so by the business council and all checks must be signed by the treasurer. The business council shall decide when the amount of funds being handled by the treasurer has become large enough to justify the need for an annual audit. It shall then require that the books and records of the treasurer shall be audited by either a competent auditor or by a Federal employee appointed by the Commissioner of Indian Affairs or his authorized representative. The treasurer will be required to have a surety bond satisfactory to the business council and the Superintendent of the Western Washington Agency. The surety bond will be obtained at the expense of the tribe.

SEC. 5. *Appointive Officers.* The duties of all appointive committees and officers appointed by the business council shall be clearly defined by resolution of the business council at the time of their creation or appointment. Such committees or officers shall report from time to time, as required, to the business council and their activities and decisions shall be subject to review by the business council upon petition of any person aggrieved.

## Article II—Installation of Officers and Council Members

Newly elected members who have been duly certified shall be installed thereafter at the next regular meeting of the business council. Each member of the business council and each officer or subordinate officer, elected or appointed hereunder, shall take an oath of office prior to assuming the duties thereof, by which oath he shall pledge himself to support and defend the Constitution of the United States and this constitution and bylaws.

Oath: "I, _____, do solemly swear that I will support and defend the Constitution of the United States and the constitution of the Lummi Tribe; that I will carry out, faithfully and impartially, the duties of my office to the best of my ability; that I will cooperate, promote, and protect the best interests of my tribe, in accordance with its constitution and bylaws."

## Article III—Time and Place of Meetings and Procedure

Section 1. *Regular meetings* of the business council shall be held on the first Friday of each month. The date of regular meetings may be changed by resolution of the business council. Meetings shall be held at the business office or such other places as the business council may designate from time to time. Special meetings may be called by written notice to all councilmen, signed by the chairman, or by a majority of the business council, and when so called by written notice to all councilmen, the business council shall have power to transact business as in a regular meeting.

Sec. 2. *The annual election and general council meeting* shall be held during the first week in January of each year, or at such other time as the business council determines.

Sec. 3. *Quorum.* No business shall be transacted



unless a quorum is present. A quorum of the business council shall consist of six (6) members of that council. A quorum of the general council shall consist of twenty-five (25) eligible voters; provided, however, that the lack of a quorum shall not be cause for postponing the annual election of tribal officials.

Sec. 4. *The order of business* for all meetings is that established in *Robert's Rules of Order,* Revised Edition.

## Article IV—Ratification of Constitution and Bylaws

This constitution and bylaws, when adopted by a majority vote of the adult voters of the Lummi Tribe, voting at a special election authorized by the Commissioner of Indian Affairs in which at least thirty percent (30%) of those entitled to vote shall vote, shall be submitted to the Commissioner of Indian Affairs for his approval. It shall be in force from the date of such approval.

### Approval

I, James F. Canan, Acting Commissioner of Indian Affairs do hereby approve the foregoing Constitution and Bylaws of the Lummi Tribe of the Lummi Reservation, Washington, as provided for in Article IV of the bylaws — Ratification of Constitution and Bylaws of said document.

/s/_____
James F. Canan
Acting Commissioner of
Indian Affairs

Washington, D.C.
Date: April 10, 1970

**EXHIBIT 10.3** [to Pre-Trial Order]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

*

CONSTITUTION AND BYLAWS OF THE
MAKAH INDIAN TRIBE OF THE
MAKAH INDIAN RESERVATION
WASHINGTON

*

APPROVED MAY 16, 1936

* * * *

# CONSTITUTION AND BYLAWS OF THE MAKAH INDIAN TRIBE OF THE MAKAH INDIAN RESERVATION

## PREAMBLE

We, the members of the Makah Indian Tribe, in order to establish a more perfect tribal organization, promote the general welfare, conserve and develop our land, timber, and other resources, and secure to ourselves and our posterity the power to exercise certain rights of home rule, not inconsistent with the Federal, State, and local laws, do ordain and establish this constitution for the Makah Indian Tribe of the Makah Indian Reservation, of the State of Washington.

## ARTICLE I.—TERRITORY

The jurisdiction of the Makah Indian Tribe shall extend to the territory within the confines of the Makah Indian Reservation boundaries as established in the treaty of January 31, 1855, and by Executive orders made pursuant thereto, and to such other lands as may be hereafter added thereto.



## ARTICLE II.—MEMBERSHIP

SECTION 1. The membership of the Makah Indian Tribe shall consist as follows:

*(a)* All persons of Indian blood whose names appear on the official census roll of the tribe as of April 1, 1935.

*(b)* All children born to any member of the Makah Indian Tribe who is a resident of the reservation at the time of the birth of said child.

*(c)* Persons of Makah Indian blood who may hereafter be adopted as tribal members by order of the tribe.

SEC. 2. The tribal council shall have the power to promulgate ordinances, subject to review by the Secretary of the Interior, governing, future membership and the adoption of new members. Property rights shall not be changed by any action under this section.

## ARTICLE III.—GOVERNING BODY

SECTION 1. The governing body of the Makah Indian Tribe shall consist of a council known as the Makah Indian tribal council.

SEC. 2. This council shall consist of five members, duly elected to serve 3 years, except as provided in section 4, two members being elected each year except that every third year, one shall be elected.

SEC. 3. The council so organized shall elect from within its own number (1) a chairman; (2) a vice chairman; and from within or without (3) a secretary, and (4) a treasurer; and may appoint or employ such other officers or committees as may be deemed necessary.

SEC. 4. The present tribal council within 60 days after the ratification and approval of this constitution, shall call a general tribal meeting for the election of officers in accordance with this constitution. The two candidates receiving the highest number of votes shall hold office until December 1938. The two candidates receiving the next highest number of votes shall hold office until December 1937, and the next highest until December 1936. Thereafter, the term of office for councilmen elected under this constitution shall be 3 years. After the first

election, elections for the tribal council shall be held on the last Monday in December.

ARTICLE IV.—ELECTIONS FOR THE TRIBAL COUNCIL

SECTION 1. Any member of the tribe 21 years of age or over who has maintained a legal residence on the reservation for 1 year immediately preceding any election shall be entitled to vote or be elected to office therein.

SEC. 2. Any legal voter shall be eligible to serve as a member of the council.

SEC. 3. All elections shall be by secret ballot and shall be held in accordance with rules and regulations prescribed by the tribal council, or by an election board appointed by the tribal council.

ARTICLE V.—VACANCIES AND REMOVAL FROM OFFICE

SEC. 1. If a council member shall die, resign, or permanently leave the reservation, or be removed from office for cause, the council shall declare the position vacant and appoint a successor to serve until the annual general tribal meeting in December, at which time the general tribal meeting shall elect a successor for the unexpired term.

SEC. 2. The tribal council may, by a four-fifths vote of its total membership, expel any member for neglect of duty or gross misconduct, provided such charges are in writing, subscribed by competent witnesses and formally served upon the accused at least 5 days prior to the hearing. The accused member shall be given a full and fair opportunity to reply to any and all such charges against himself, and also the opportunity to summon witnesses in his behalf.

SEC. 3. Upon a petition of at least one-third of the eligible voters of the Makah Indian Tribe it shall be the duty of the tribal council to call a special election to consider the recall of the member or members of the council named in such petition. In the event that a majority of those voting in such election favor such recall from office, the office shall be declared vacant and the



tribal council shall proceed in the usual manner to hold an election to fill the said vacancy.

ARTICLE VI.—POWERS OF THE TRIBAL COUNCIL

SECTION 1. The tribal council shall exercise the following powers, subject to any limitations imposed by the Federal statutes, the Constitution of the United States, and subject further to all express restrictions upon such powers provided in this constitution and bylaws.

*(a)* To negotiate with the Federal, State, and local Governments on behalf of the tribe, and to advise and consult with the representatives of the Interior Department on all activities of the Department that may affect the tribe and its members.

*(b)* To employ legal counsel for the protection and advancement of the rights of the tribe and its members, the choice of such counsel and the fixing of fees to be subject to the approval of the Secretary of the Interior.

*(c)* To approve or veto any sale, disposition, lease, or incumbrance of tribal lands, interests in lands, or other tribal assets which may be authorized or executed by the Secretary of the Interior, the Commissioner of Indian Affairs, or any other official or agency of Government, provided that no tribal lands shall ever be sold or encumbered except for governmental purposes, or leased for a period exceeding 5 years, except that leases for mining purposes may be made for such longer periods as may be authorized by law.

*(d)* To advise with the Secretary of the Interior or his representatives on all appropriation estimates, or Federal projects for the benefit of the tribe prior to their submission to the Bureau of the Budget and to Congress.

*(e)* To manage all economic affairs and enterprises of the tribe, in accordance with the terms of a charter that may be issued to the tribe by the Secretary of the Interior.

*(f)* To levy and collect taxes upon members of the tribe, or to require the performance of community labor in lieu thereof, provided that no taxes may be levied, nor community labor required, except when approved at the

annual December general tribal meeting, or at a special general tribal meeting called for that purpose.

*(g)* To levy and collect taxes or license fees upon nonmembers doing business on the reservation, to exclude from the territory of the tribe persons not legally entitled to reside thereon, or trespassers upon the reservation, under ordinances, all of which shall be subject to review by the Secretary of the Interior.

*(h)* To enact resolutions or ordinances not inconsistent with article II of this constitution, governing adoption and abandonment of membership, and to keep at all times a correct roll of the members of the Makah Indian Tribe.

*(i)* To promulgate and enforce ordinances, which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Makah Indian Tribe, and providing for the maintenance of law and order, and the administration of justice by establishing a reservation Indian court, and defining its duties, powers, and limitations.

*(j)* To safeguard and promote the peace, safety, morals, and general welfare of the Makah Indian Tribe by regulating the conduct of trade and the use and disposition of property upon the reservation: *Provided*, That any ordinances directly affecting nonmembers of the tribe shall be subject to review by the Secretary of the Interior.

*(k)* To charter subordinate organizations for economic purposes, and to regulate the activities of cooperative associations of members of the Makah Indian Tribe by ordinance: *Provided*, That any such ordinance shall be subject to review by the Secretary of the Interior.

*(l)* To appropriate for public purposes of the tribe any available tribal funds, provided that any such appropriation made prior to July 1, 1940, shall be subject to review by the Secretary of the Interior.

*(m)* To provide for the appointment of guardians for minors and mental incompetents by ordinance or



resolution subject to review by the Secretary of the Interior.

*(n)* To adopt resolutions regulating the procedure of the council itself and other tribal agencies and tribal officials of the reservation.

*(o)* To delegate to subordinate boards, or to cooperative associations which are open to all members of the tribe, any of the foregoing powers, reserving the right to review any action taken by such body to whom such power has been delegated.

SEC. 2. *Manner of review.*—Any resolution or ordinance which by the terms of this constitution is subject to review by the Secretary of the Interior, shall be presented to the superintendent of the reservation who shall, within 10 days thereafter, approve or disapprove the same. If the superintendent shall approve said ordinance or resolution it shall thereupon become effective, but the superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may within 90 days from the date of enactment rescind the said ordinance or resolution for any cause by notifying the tribal council of such decision.

If the superintendent shall refuse to approve any resolution or ordinance submitted to him within 10 days after its enactment, he shall advise the Makah tribal council of his reasons therefor. If these reasons appear to the council insufficient, it may by a majority vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within 90 days from the date of its enactment, approve the same in writing, whereupon the said ordinance or resolution shall become effective.

SEC. 3. *Further powers.*—The Makah Indian tribal council may exercise such further powers as may in the future be delegated to it by the Secretary of the Interior, or by any other duly authorized official or agency of government.

SEC. 4. *Reserved powers.*—Any rights or powers heretofore vested in the Makah Indian Tribe but not

expressly referred to in this constitution shall not be abridged by this article, but may be exercised by the people of the Makah Indian Tribe through the adoption of appropriate bylaws and constitutional amendments.

ARTICLE VII—BILL OF RIGHTS

SECTION 1. *Suffrage.*—All members of the tribe over the age of 21 shall have the right to vote in all tribal elections. The residence qualifications established by article IV of this constitution shall apply to all elections except elections for the amendment of this constitution and bylaws.

SEC. 2. *Economic right.*—All members of the tribe shall be accorded equal opportunities to participate in the economic resources and activities of the reservation.

SEC. *Civil liberties.*—All members of the tribe may enjoy, without hindrance, freedom of worship, conscience, speech, press, assembly, and association.

SEC. 4. *Rights of accused.*—Any member of the Makah Indian Tribe accused of any offense shall have the right to a prompt, open, and public hearing, with due notice of the offense charged, and shall be permitted to summon witnesses on his own behalf. Trial by jury may be demanded by any prisoner accused of any offense punishable by more than 30 days' imprisonment or by more than $45 fine.

Excessive bail shall not be required and cruel punishment shall not be imposed.

ARTICLE VIII.—LAND

SECTION 1. *Allotted lands.*—Allotted lands, including heirship lands, within the Makah Reservation shall continue to be held as heretofore by their present owners. It is recognized that under existing law such lands may be condemned for public purposes, such as roads, public buildings, or other public improvements, upon payment of adequate compensation, by any agency of the State of Washington or of the Federal Government, or by the tribe itself. It is further recognized that under existing law such



lands may be inherited by the heirs of the present owner, whether or not they are members of the Makah Indian Tribe. Likewise it is recognized that under existing law the Secretary of the Interior may, in his discretion, remove restrictions upon such land, upon application by the Indian owner, whereupon the land will become subject to State taxes and may then be mortgaged or sold. The right of the individual Indian to hold or to part with his land, as under existing law, shall not be abrogated by anything contained in the constitution, but the owner of restricted land may, with the approval of the Secretary of the Interior, voluntarily convey his land to the Makah Indian Tribe either in exchange for a money payment or in exchange for an assignment covering the same land, or other land, as hereinafter provided.

SEC. 2. *Tribal lands.*—The unallotted lands of the Makah Reservation, and all lands which may hereafter be acquired by the Makah Indian Tribe or by the United States in trust for the Makah Indian Tribe shall be held as tribal lands, and no part of such land shall be mortgaged or sold. Tribal lands shall not be allotted to individual Indians but may be assigned to members of the Makah Indian Tribe, or leased, or otherwise used by the tribe, as hereinafter provided.

SEC. 3. *Leasing of tribal lands.*—Tribal lands may be leased by the tribal council, with the approval of the Secretary of the Interior, for such periods of time as are permitted by law.

In the leasing of tribal lands preference shall be given, first, to Indian cooperative associations of members of the tribe; and secondly, to individual Indians who are members of the Makah Indian Tribe.

SEC. 4. *Grant of standard assignments.*—In any assignment of tribal lands which now are owned by the tribe or which hereafter may be acquired for the tribe by the United States or purchased by the tribe out of tribal funds, preference shall be given, first, to heads of families which are entirely landless; and secondly, to heads of

families which shall have no allotted lands or interests in allotted lands, but shall have already received assignments consisting of less than an economic unit of agricultural land or other land or interest in land of equal value.

No allotted member of the Makah Indian Tribe who may hereafter have the restrictions upon his land removed and whose land may thereafter be alienated except to the tribe shall be entitled to receive an assignment of land as a landless Indian.

The tribal council may, if it sees fit, charge a fee of not to exceed $5 on approval of an assignment made under this section.

Assignments made under this section shall be for the primary purpose of establishing homes for landless Indians, and shall be known as standard assignments.

SEC. 5. *Tenure of standard assignments.*—If any member of the tribe holding a standard assignment of land shall, for a period of 2 years fail to use the land so assigned or use such land for any unlawful purpose, his assignment may be canceled by the tribal council after due notice and an opportunity to be heard, and the said land may be reassigned in accordance with the provisions of section 4 of this article.

Upon the death of any Indian holding a standard assignment, his heirs or other individuals designated by him, by will or by written request, shall have a preference in the reassignment of the land, provided such persons are members of the Makah Indian Tribe who would be eligible to receive a standard assignment.

SEC. 6. *Grant of exchange assignments.*—Any member of the tribe who owns an allotment or any share of heirship land may voluntarily transfer his interests in such land to the tribe in exchange for an assignment to the same land or other land of equal value. If the assignee prefers, he may receive, in lieu of a specific tract of land, a proportionate share in a larger grazing unit.

Assignments made under this section shall be known as "exchange assignments."



SEC. 7. *Leasing of exchange assignments.*—Exchange assignments may be used by the assignee or leased by him to Indian cooperative associations of members of the tribe to individual members of the tribe, or, if no individual Indian or Indian cooperative association of members is able and willing to rent the land at a reasonable fee, such assignments may be leased to non-members in the same manner as allotted lands.

SEC. 8. *Inheritance of exchange assignments.*—Upon the death of the holder of any exchange assignment, such land shall be reassigned by the tribal council to his heirs or devisees, subject to the following conditions:

*(a)* Such lands may not be reassigned to any heir or devisee who is not a member of the Makah Indian Tribe, except that a life assignment may be made to the surviving widower or widow of the holder of an assignment.

*(b)* Such lands may not be reassigned to any heir or devisee who already holds more than an economic unit of land to be determined from time to time by the tribal council.

*(c)* Such lands may not be subdivided among heirs or devisees into units too small for convenient management. No area of uncleared or timber land shall be subdivided into units smaller than 40 acres, and no area of tillable agricultural land shall be subdivided into units smaller than 2½ acres, except that land used for buildings or other improvements may be divided to suit the convenience of the parties. Where it is impossible to divide the land properly among the eligible heirs or devisees, the tribal council may issue to the eligible heirs or devisees interests in tribal lands of the same value as the assignment of the decedent.

*(d)* If there are no eligible heirs or devisees of the decedent, the land shall be eligible for reassignment in accordance with the provisions of section 4 of this article.

SEC. 9. *Inheritance of improvements.*—Improvements of any character made upon assigned land may be bequeathed to and inherited by members of the

Makah Indian Tribe or otherwise disposed of under such regulations as the tribal council shall provide: *Provided further,* That sales of improvements on the land of any decedent can be made only to members of the Makah Indian Tribe.

SEC. 10. *Exchange of assignments.*—Assignments may be exchanged between members of the Makah Indian Tribe by common consent in such manner as the tribal council shall designate.

SEC. 11. *Use of unassigned tribal land.*—Tribal land which is not assigned, including tribal timber reserves, shall be managed by the tribal council for the benefit of the members of the entire tribe, and any cash income derived from such land accrue to the benefit of the tribe as a whole. All action of the tribal council with respect to such lands shall be in conformity with departmental regulations for the protection of Indian range and timber resources authorized by section 6 of the act of June 18, 1934.

SEC. 12. *Purchase of land by tribe.*—Tribal funds may be used, with the consent of the Secretary of the Interior, to acquire land, under the following conditions:

*(a)* Land within the Makah Reservation or adjacent to the boundaries thereof which is not now in Indian ownership may be purchased by or for the Makah Indian Tribe.

*(b)* Restricted land, which is in heirship status at the time of the adoption and approval of this constitution, may be purchased by or for the tribe, with the consent of all the adult heirs, and the legal guardians of minor heirs, payment therefor to be made as may be agreed upon.

*(c)* Land owned by any member of the tribe who is over the age of 60 years, or who is physically incapacitated, may be transferred by its owner to the tribe in exchange for a pension of not more than twice the annual rental value of the land for the life of the pensioner, to be paid out of available tribal funds.

*(d)* Land owned by any member of the tribe in excess



of his needs for domestic purposes may be purchased by the tribe with the consent of the owner, payments to be made on such terms as may be agreed upon by the council and the owner.

*(e)* Land owned by any members of the tribe who desire to leave the reservation permanently may be purchased by the tribe under such terms as may be agreed upon.

SEC. 13. *Method of making assignments.*—Applications for assignment shall be filed with the secretary of the council and shall be in writing, setting forth the name of the person or persons applying for the land and as accurate a description of the land desired as the circumstances will permit.

Notice of all applications received by the secretary shall be posted by him in the agency office and in at least three other conspicuous places on the reservation for not less than 20 days before action is taken by the council. Any member of the tribe wishing to oppose the granting of an assignment shall do so in writing, setting forth his objections, to be filed with the secretary of the council, and may if he so desires, appear before the council to present evidence. The secretary of the council shall furnish the superintendent or other officers in charge of the agency a complete record of all action taken by the council on applications for assignment of land, and a complete record of assignments shall be kept in the agency office and shall be open for inspection by members of the tribe.

The council shall draw up one or more forms for standard and exchange assignments, which shall be subject to the approval of the Secretary of the Interior.

## ARTICLE IX.—REFERENDUM

Upon a petition of [*sic*] least one-third of the qualified voters of the Makah Indian Tribe, a referendum may be demanded on any enacted or proposed ordinance or resolution of the tribal council, and the vote of the

majority of the qualified voters in such referendum shall be conclusive and binding on the tribal council.

### ARTICLE X.—AMENDMENTS

This constitution and bylaws may be amended by a majority vote of the qualified voters of the tribe voting at an election called for that purpose by the Secretary of the Interior, provided that at least 30 percent of those entitled to vote shall vote in such election; but no amendment shall become effective until it shall have been approved by the Secretary of the Interior.

It shall be the duty of the Secretary of the Interior to call an election on any proposed amendment upon receipt of a petition signed by one-third of the qualified voters, members of the tribe.

## BYLAWS OF THE MAKAH INDIAN TRIBE

### ARTICLE I.—DUTIES OF OFFICERS

SECTION 1. *Chairman of the council.*—The chairman of the council shall preside over all meetings of the council; shall perform all duties of the chairman, and exercise any authority delegated to him by the council. The chairman shall also preside at all regular and special meetings of a general tribal nature. He shall vote only in case of a tie.

SEC. 2. *Vice chairman of the council.*—The vice chairman shall assist the chairman when called upon so to do. In the absence of the chairman he shall preside; when so presiding he shall have all the rights, privileges, duties, and responsibilities, of the chairman.

SEC. 3. *Secretary of the council.*—The secretary of the tribal council shall conduct all tribal correspondence and shall keep an accurate record of all business transacted at council meetings. It shall be his duty to keep minutes of regular and special tribal meetings and to submit copies of such minutes to the superintendent of the jurisdiction and also to the Commissioner of Indian Affairs.



SEC. 4. *Treasurer of the council.*—The treasurer of the tribal council shall account for, receive, receipt for, preserve, and safeguard all funds in the custody of the council, whether same be tribal or other funds for which the council is acting as trustee or custodian. Deposits of such funds shall be made in a bank or elsewhere, as designated by the council, and he shall make and preserve a financial record of all such funds and shall report on all receipts and expenditures, and the amount and nature of all funds in his possession or custody, such report being made in writing to the council at regular meetings, and at such other times as requested by the council. He shall not pay out or otherwise disburse any funds in his possession or custody, or in the possession or custody of the tribal council, until properly authorized so to do by resolution duly passed by the council.

The books and records of the treasurer shall be audited at least once each year by a competent auditor employed by the council and at such other times as the council or the Commissioner of Indian Affairs may direct.

The treasurer shall be required to furnish a bond satisfactory to the council and to the Commissioner of Indian Affairs, and the council is hereby authorized to pay the premium on such bond from any available funds. The treasurer shall be present at all special or regular meetings of the council.

SEC. 5. *Duties of appointive officers and boards.*—The duties of all appointive boards or officers of the council shall be clearly defined by resolution of the council at the time of their creation or appointment. Such boards and officers shall report from time to time, as required, to the council, and their activities and decisions shall be subject to review by the council upon the complaint of any person aggrieved.

### ARTICLE II.—CERTIFICATION OF ELECTION

It shall be the duty of the tribal council, or a board appointed by them, to certify to the election of the newly elected tribal council members within 5 days after the

election and thereupon they shall be notified by the secretary of their election.

ARTICLE III.—INSTALLATION OF COUNCIL MEMBERS

Newly elected members who have been duly certified shall be installed thereafter at the next regular meeting of the tribal council. Each newly elected member shall subscribe to the following oath:

STATE OF WASHINGTON,
*County of Clallam, ss:*

I, _____, do solemnly swear (or affirm) that I will support and uphold the Constitution of the United States, the constitution and laws of the State of Washington and the constitution, bylaws, and ordinances of the Makah Indian Tribe of the Makah Indian Reservation in the State of Washington.

That I will in all respects faithfully and fully perform the duties of my office of _____ for the Makah Indian Tribe of the Makah Indian Reservation, so help me God.

_____

Subscribed and sworn to before me this _____ day of ____ 19 __.

_____

(The oath may be taken and subscribed to before any officer authorized to administer oaths in the State of Washington.)

ARTICLE IV.—COMPENSATION

The tribal council may prescribe such compensation of officers or members of the council as it deems advisable from such funds as may be available, subject to approval of the general tribal meeting.

ARTICLE V.—TIME AND PLACE OF MEETINGS

SECTION 1. *Meetings.*—Regular meetings of the tribal council shall be held at the agency at Neah Bay on the



first Monday of January, April, July, and October, and at such other times as the tribal council may by resolution provide.

Special meetings may be called by a written notice signed by the majority of the tribal council, and, when so called, the tribal council shall have power to transact business as in regular meetings.

SEC. 2. *Quorum.*—No business shall be transacted unless a quorum is present. A quorum shall consist of four council members.

SEC. 3. *Order of business.*—The following order of business is established for all meetings:

1. Call to order by chairman.
2. Roll call.
3. Reading the minutes of last meeting.
4. Unfinished business.
5. Reports.
6. New business.
7. Adjournment.

ARTICLE VI.—GENERAL TRIBAL MEETINGS

SECTION 1. There shall be an annual general tribal meeting open to all members of the tribe held at the agency on the last Monday in December. At this annual meeting, elections shall be held as designated heretofore in this constitution. The bylaws, orders, and resolutions, which are subject to approval at the general tribal meeting, shall be taken up for consideration at this time.

It shall also be the duty of the chairman to make a report at said meeting of the activities of the council throughout the year and to outline proposed plans for economic and social betterment of the tribe.

SEC. 2. Special general tribal meetings may be called by the chairman of the general council: *Provided,* That due notice is posted throughout the reservation at least 15 days prior to such meeting.

Fifty legal voters of the tribe may at any time, by written petition, call a general tribal meeting, provided

that at least 15 days' notice is posted throughout the reservation.

ARTICLE VII.—ADOPTION OF CONSTITUTION OF BYLAWS

This constitution and bylaws, when ratified by a majority vote of the qualified voters of the Makah Indian Tribe of the Makah Reservation voting at an election called for the purpose by the Secretary of the Interior, provided that at least 30 percent of those entitled to vote shall vote in such election, shall be submitted to the Secretary of the Interior, and, if approved, shall be effective from the date of approval.

CERTIFICATION OF ADOPTION

Pursuant to an order, approved March 21, 1936, by the Secretary of the Interior, the attached constitution and bylaws were submitted for adoption to the adult members of the Makah Indian Tribe and were on April 18, 1936, duly adopted by a vote 58 for, and 15 against, in an election in which over 30 percent of those entitled to vote cast their ballots, in accordance with section 16 of the Indian Reorganiztion Act of June 18, 1934 (48 Stat. 984), as amended by the act of June 15, 1935 (Public, No. 147, 74th Cong.).

PERCY IDES,
*Chairman of Election Board.*
JERRY MCCARTY,
*Chairman, Makak [sic] Indian Tribal Council.*
HILDRED MCCARTY,
*Secretary, Makah Indian Tribal Council.*

N. O. NICHOLSON,
*Superintendent.*

I, Harold L. Ickes, the Secretary of the Interior of the United States of America, by virtue of the authority granted me by the act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached constitution



and bylaws of the Makah Indian Tribe of the Makah Indian Reservation.

All rules and regulations heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said constitution or bylaws are hereby declared inapplicable to the Makah Indian Tribe of the Makah Indian Reservation.

All officers and employees of the Interior Department are ordered to abide by the provisions of the said constitution and bylaws.

Approval recommended May 7, 1936.

WILLIAM ZIMMERMAN, JR.,
*Assistant Commissioner of Indian Affairs.*

HAROLD L. ICKES,
*Secretary of the Interior.*

WASHINGTON, D.C., *May 16, 1936.* [SEAL]

**EXHIBIT 10.8 [to Pre-Trial Order]**

Resolution No. 1974-565
Date Enacted August 23, 1974

RESOLUTION NO. 1974-

COLVILLE TOBACCO ORDINANCE
AS AMENDED

WHEREAS, the Colville Business Council is the duly constituted governing body of the Confederated Tribes of the Colville Indian Reservation, and

WHEREAS, under the Constitution and By-Laws of the Tribes, the Colville Business Council is charged with the duty of protecting the health, security and general welfare of the Colville Confederated Tribes, and

WHEREAS, by virtue of their status as Indian tribes, the Colville Confederated Tribes are authorized by federal law to possess unstamped cigarettes and other tobacco products on the Colville Indian Reservation and to regulate their sale and distribution, and

WHEREAS, the Colville Business Council deems it essential to the health, security and general welfare of the Colville Confederated Tribes to enact a comprehensive tobacco ordinance regulating sale and distribution of cigarettes and other tobacco products and levying an excise tax upon their distribution on the Colville Indian Reservation, and

WHEREAS, the Colville Business Council has heretofore adopted Resolution 1973-375, but now wishes to clarify some sections of that ordinance and to expand the remedies available for violation of the ordinance, and to increase the number of cartons of cigarettes which may be sold to non-Indians,

NOW, THEREFORE, the Colville Business Council does hereby promulgate and enact the following amended



tobacco ordinance to supersede any previous tobacco ordinance heretofore enacted.

**AN ORDINANCE**

Governing sale, distribution and
taxation of tobacco products
within the Colville Indian
Reservation

**Section 1. Title.**

This ordinance shall be known as the Colville Tobacco Ordinance.

**Section 2. Definitions.**

As used in this ordinance, the following words and phrases shall each have the designated meaning unless a different meaning is expressly provided or the context is clearly indicated:

(a) "Tribes" shall mean the Confederated Tribes of the Colville Indian Reservation.

(b) "Council" shall mean the Colville Business Council.

(c) "Cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

(d) "Tobacco Products" shall mean cigarettes, cigars, smoking tobacco, snuff, chewing tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking.

(e) "Taxable Event" shall mean the sale, use, consumption, handling, possession or distribution of each tobacco product.

(f) "Retail Selling Price" shall mean the ordinary, customary or usual price paid by the consumer for each tobacco product, less the tax levied by this ordinance.

(g) "Wholesale Distribution Price" shall mean the price paid for each tobacco product by the Tribes together with all freight charges and other expenses incurred by the Tribes in their receipt and distribution.

(h) "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land within the Colville Indian Reservation.

(i) "Operator" shall mean an enrolled member of the Colville Confederated Tribes licensed by the Tribes to manage a tobacco outlet.

**Section 3. Establishment of Tobacco Outlets.**

The Council shall establish one or more tobacco outlets within the Colville Indian Reservation as the Council in its sole discretion deems necessary to provide adequate service to consumers of cigarettes and tobacco products.

**Section 4. Nature of Outlet.**

Each tobacco outlet established hereunder shall be a tribal tobacco outlet and shall be managed for the Tribes by an operator pursuant to a license granted by the Council hereunder, and shall also be managed pursuant to a Federal Indian Trader's License as provided in Section 7 hereof.

**Section 5. Application for Tobacco Outlet License.**

Any enrolled member of the Colville Confederated Tribes may apply upon an application form provided by the Council for a tobacco outlet license. The application shall state the name and address of the applicant and shall be signed by the applicant under oath.



**Section 6. Tobacco Outlet License.**

Upon approval of an application, the Council shall issue the applicant a tobacco outlet license for a five-year period which shall entitle the operator to establish and maintain one tobacco outlet on the Colville Indian Reservation. The license shall be renewable in such manner as the Council shall prescribe and shall be nontransferable.

**Section 7. Trader's License.**

No tobacco outlet license shall be issued to an operator until he has obtained a Federal Indian Trader's License from the Superintendent of the Colville Indian Agency. Revocation of the Federal Indian Trader's License shall be grounds for revocation of the operator's tobacco outlet license.

**Section 8. Excise Tax Imposed.**

There is being levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes in the amount of three cents per package. The Council may levy an additional tax upon the distribution of cigarettes and other tobacco products as it deems desirable. The excise tax levied hereunder shall be a tax upon distribution of cigarettes and other tobacco products by the Tribes only and shall not constitute an assessment or license fee upon enrolled members of the Tribes doing business within the reservation or obtaining special rights or privileges.

The excise tax levied hereunder shall be first a tax upon distribution of cigarettes and other tobacco products by the Tribes pursuant to Section 10 of this ordinance; provided, however, that failure to pay the tax at the time of such distribution shall not prevent tax liability from arising by reason of another taxable event. The excise tax levied hereunder shall be added to the retail price of tobacco products sold to the ultimate consumer.

**Section 9. Purchase by Tribes.**

All tobacco products purchased by the Tribes pursuant hereto shall be purchased with federally-restricted tribal funds.

**Section 10. Wholesale Distribution.**

Wholesale distribution of tobacco products by the Tribes to a tobacco outlet shall be upon a cash basis for the wholesale distribution price which shall have added to it the excise tax levied in Section 8 hereof.

**Section 11. Tobacco Products Federally Restricted Tribal Property.**

The entire stock of tobacco products distributed hereunder shall remain federally-restricted tribal property owned and possessed by the Tribes until sale to the ultimate consumer. Payment by the operator of the wholesale distribution price plus the excise tax as provided in Section 10 hereof shall entitle the operator to custody of distributed tobacco products for sale to the ultimate consumer, at the operator's sole risk in the event of any loss whatsoever.

**Section 12. Remuneration to Operator.**

As remuneration for managing a tobacco outlet, an operator shall be entitled to the gross revenue derived from sale of tobacco products distributed hereunder in excess of the wholesale distribution price and the excise tax levied hereunder.

**Section 13. Restricted Sales to Non-Indians.**

An operator may not sell more than three cartons of cigarettes per sale to a non-Indian. The Council may restrict sales of other tobacco products to non-Indians as it deems necessary.

**Section 14. Restricted Sales to Minors.**

An operator may not sell any tobacco products to any person under the age of 18 years.



**Section 15. Other Business by Operator.**

An operator may conduct another business simultaneously with managing a tobacco outlet for the Tribes. The other business may be conducted on the same premises and the operator shall not be required to maintain separate books of account for the other business.

**Section 16. Tribal Immunity — Liability — Credit.**

An operator shall not attempt or be authorized to waive the sovereign immunity of the Tribes from suit, nor shall such operator attempt or be authorized to create any liability on behalf of the Tribes or to utilize tribal credit.

**Section 17. Operating Without License.**

No person shall operate a tobacco outlet on the Colville Indian Reservation without having in effect a valid tobacco outlet license issued pursuant hereto.

**Section 18. Purchases.**

An operator shall purchase all tobacco products sold in his tobacco outlet from the Tribes.

**Section 19. Liability Insurance.**

An operator shall maintain liability insurance upon his premises in the sum of $100,000.

**Section 20. Revocation of Tobacco Outlet License.**

Failure of an operator to abide by the requirements of this ordinance and any additional requirement imposed by the Council will constitute grounds for revocation of the operator's tobacco outlet license as well as enforcement of the remedies provided in Section 21 below.

**Section 21. Violation — Remedies.**

Upon application by the Chairman of the Council, the Tribal Judge shall issue an order directing the Tribal Law Enforcement Officer to seize all tobacco products from wherever purchased and by whomever owned from any

tobacco outlet being operated in violation of this ordinance. Within three days of such seizure, after adequate notice to the operator of such outlet, a hearing shall be held in Tribal Court at which time the operator of such outlet shall be given an opportunity to present evidence in defense of his activities. If the Tribal Court shall determine by a preponderance of the evidence that such tobacco outlet was being operated in violation of this ordinance, the Judge shall impose a fine of not less than $50 nor more than $250 in addition to the forfeiture of tobacco products described above.

**Section 22. Recovery of Taxes Owed.**

The Tribes shall have a cause of action in Tribal Court to recover any taxes owed and not paid to the Tribes in accordance with this or any previous ordinance.

**Section 23. Separability.**

If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainder of this ordinance, or the application of the provision to other persons or circumstances is not affected.

COLVILLE BUSINESS COUNCIL

/s/_____
Chairman

THE FOREGOING RESOLUTION was adopted at a special meeting held on August 23, 1974, at which time 8 Council members were present, and was passed by a vote of 8 FOR and 0 AGAINST, the Chairman, or the Vice Chairman in the Chairman's absence, being authorized to sign the Resolution.

/s/_____
Secretary



**EXHIBIT 10.9 [to Pre-Trial Order]**

Resolution No. 13-75
Date Enacted August 22, 1974

RESOLUTION NO. 13-75

MAKAH TOBACCO ORDINANCE AS AMENDED

WHEREAS, the Makah Tribal Council is the governing body of the Makah Tribe, an Indian Chartered Corporation as defined in the Reorganization Act of June 18, 1934, and

WHEREAS, under the Constitution and By-Laws of the Tribe, the Makah Tribal Council is charged with the duty of safeguarding and prompting [*sic*] the peace, safety, morals and general welfare of the Makah Tribe by regulating the conduct of trade and the use and disposition of property upon the Reservation, and

WHEREAS, by virtue of its status as an Indian tribe, the Makah Tribe is authorized by federal law to possess unstamped cigarettes and other tobacco products on the Makah Indian Reservation and to regulate their sale and distribution, and

WHEREAS, the Makah Tribal Council deems it essential to the peace, safety, morals, and general welfare of the Makah Tribe to enact a comprehensive tobacco ordinance regulating sale and distribution of cigarettes and other tobacco products and levying an excise tax upon their distribution on the Makah Indian Reservation, and

WHEREAS, the Makah Tribal Council has heretofore adopted Makah Tobacco Ordinance, Resolution No. 52-73, but now wishes to increase the number of cartons of cigarettes which may be sold to non-Indians,

NOW, THEREFORE, the Makah Tribal Council does hereby promulgate and enact the following amended

tobacco ordinance to supersede any previous tobacco ordinance heretofore enacted.

## AN ORDINANCE

Governing sale, distribution and
taxation of tobacco products within
The Makah Indian Reservation

**Section 1. Title.**

This ordinance shall be known as the Makah Tobacco Ordinance.

**Section 2. Definitions.**

As used in this ordinance, the following words and phrases shall each have the designated meaning unless a different meaning is expressly provided or the context is clearly indicated:

(a) "Tribe" shall mean the Makah Tribe of the Makah Indian Reservation.

(b) "Council" shall mean the Makah Tribal Council.

(c) "Cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

(d) "Tobacco Products" shall mean cigarettes, cigars, smoking tobacco, snuff, chewing tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking.

(e) "Taxable Event" shall mean the sale, use, consumption, handling, possession or distribution of each tobacco product.

(f) "Retail Selling Price" shall mean the ordinary,



customary or usual price paid by the consumer for each tobacco product, less the tax levied by this ordinance.

(g) "Wholesale Distribution Price" shall mean the price paid for each tobacco product by the Tribe together with all freight charges and other expenses incurred by the Tribe in their receipt and distribution.

(h) "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land within the Makah Indian Reservation.

(i) "Operator" shall mean an enrolled member of the Makah Tribe licensed by the Tribe to manage a tobacco outlet.

**Section 3. Establishment of Tobacco Outlets.**

The Council shall establish one or more tobacco outlets within the Makah Indian Reservation as the Council in its sole discretion deems necessary to provide adequate service to consumers of cigarettes and tobacco products.

**Section 4. Nature of Outlet.**

Each tobacco outlet established hereunder shall be a tribal tobacco outlet and shall be managed for the Tribe by an operator pursuant to a license granted by the Council hereunder, and shall also be managed pursuant to a Federal Indian Trader's License as provided in Section 7.

**Section 5. Application for Tobacco Outlet License.**

Any enrolled member of the Makah Tribe may apply upon an application form provided by the Council for a tobacco outlet license. The application shall state the name and address of the applicant and shall be signed by the applicant under oath.

**Section 6. Tobacco Outlet License.**

Upon approval of an application, the Council shall issue the applicant a tobacco outlet license for a five-year

period which shall entitle the operator to establish and maintain one tobacco outlet on the Makah Indian Reservation. The license shall be renewable in such manner as the Council shall prescribe and shall be nontransferable.

**Section 7. Traders License.**

Within 30 days after receipt of a tobacco outlet license, an operator must apply to the Superintendent of the Western Washington Indian Agency for a Federal Indian Trader's License. Failure of an operator to apply for or to obtain a Federal Indian Trader's License shall be grounds for revocation of the operator's tobacco outlet license.

**Section 8. Excise Tax Imposed.**

There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes in the amount of five cents per package. The Council may levy an additional tax upon the distribution of cigarettes and other tobacco products as it deems desirable.

The excise tax levied hereunder shall be first a tax upon distribution of cigarettes and other tobacco products by the Tribe pursuant to Section 9 of this ordinance; provided, however, that failure to pay the tax at the time of such distribution shall not prevent tax liability from arising by reason of another taxable event. The excise tax levied hereunder shall be added to the retail price of tobacco products sold to the ultimate consumer.

**Section 9. Wholesale Distribution.**

Wholesale distribution of tobacco products by the Tribe to a tobacco outlet shall be upon a cash basis for the wholesale distribution price which shall have added to it the excise tax levied in Section 8 hereof.

**Section 10. Tobacco Products Federally Restricted Trial Property.**

The entire stock of tobacco products distributed



hereunder shall remain federally-restricted tribal property owned and possessed by the Tribe until sale to the ultimate consumer. Payment by the operator of the wholesale distribution price plus the excise tax as provided in Section 9 hereof shall entitle the operator to custody of distributed tobacco products for sale to the ultimate consumer, at the operator's sole risk in the event of any loss whatsoever.

**Section 11. Remuneration to Operator.**

As remuneration for managing a tobacco outlet, an operator shall be entitled to the gross revenue derived from sale of tobacco products distributed hereunder in excess of the wholesale distribution price and the excise tax levied hereunder.

**Section 12. Restricted Sales to Non-Indians.**

An operator may not sell more than three cartons of cigarettes per sale to a non-Indian. The Council may restrict sales of other tobacco products to non-Indians as it deems necessary.

**Section 13. Restricted Sales to Minors.**

An operator may not sell any tobacco products to any person under the age of 18 years.

**Section 14. Other Business by Operator.**

An operator may conduct another business simultaneously with managing a tobacco outlet for the Tribe. The other business may be conducted on the same premises and the operator shall not be required to maintain separate books of account for the other business.

**Section 15. Tribal Immunity — Liability — Credit.**

An operator shall not attempt or be authorized to waive the sovereign immunity of the Tribe from suit, nor shall such operator attempt or be authorized to create any liability on behalf of the Tribe or to utilize tribal credit.

**Section 16. Operating Without License.**

No person shall operate a tobacco outlet on the Makah Indian Reservation without having in effect a valid tobacco outlet license issued pursuant hereto.

**Section 17. Purchases.**

An operator shall purchase all tobacco products sold in his tobacco outlet from the Tribe.

**Section 18. Liability Insurance.**

An operator shall maintain liability insurance upon his premises in the sum of $100,000.

**Section 19. Revocation of Tobacco Outlet License.**

Failure of an operator to abide by the requirements of this ordinance and any additional requirement imposed by the Council will constitute grounds for revocation of the operator's tobacco outlet license as well as enforcement of the remedies provided in Section 20 below.

**Section 20. Violation — Remedies.**

Upon application by the Chairman of the Council, the Tribal Judge shall issue an order directing the Tribal Law Enforcement Officer to seize all tobacco products from wherever purchased and by whomever owned from any tobacco outlet being operated in violation of this ordinance. Within three days of such seizure, after adequate notice to the operator of such outlet, a hearing shall be held in Tribal Court at which time the operator of such outlet shall be given the opportunity to present evidence in defense of his activities. If the Tribal Court shall determine by a preponderance of this evidence that such tobacco outlet was being operated in violation of this ordinance, the Judge shall impose a fine of not less than $50 nor more than $250 in addition to the forfeiture of tobacco products described above.

**Section 21. Recovery of Taxes Owed.**

The Tribe shall have a cause of action in Tribal Court



to recover any taxes owed and not paid to the Tribe in accordance with this or any previous ordinance.

**Section 22. Separability.**

If any provisions of this ordinance or its application to any person or circumstance is held invalid, the remainder of this ordinance, or the application of the provision to other persons or circumstances is not affected.

MAKAH TRIBAL COUNCIL

/s/_____
Chairman

THE FOREGOING RESOLUTION was adopted at a special meeting held on August 22, 1974, at which time 3 Council members were present, and was passed by a vote of 3 FOR and 0 AGAINST, the Chairman, or the Vice-Chairman in the Chairman's absence, being authorized to sign the Resolution.

/s/_____
Secretary

**EXHIBIT 10.10 [to Pre-Trial Order]**

Resolution No. S-3
Date Enacted August 30, 1974

RESOLUTION NO. S-3 OF THE
LUMMI BUSINESS COUNCIL

WHEREAS, the Lummi Business Council is the duly constituted governing body of the Lummi Indian Reservation by authority of the Constitution and By-Laws of the Lummi Tribe of the Lummi Reservation, Washington, as approved April 10, 1970, by the Assistant Commissioner of Indian Affairs; and,

WHEREAS, under the Constitution and By-Laws of the Tribe the Council is charged with the duty of safeguarding and promoting the peace, safety, morals and general welfare of the Lummi Tribe by regulating the conduct of trade and the use and disposition of property upon the Reservation; and,

WHEREAS, by virtue of its status as an Indian Tribe, the Lummi Tribe is authorized by federal law to possess unstamped cigarettes and other tobacco products on the Lummi Indian Reservation and to regulate their sale and distribution; and,

WHEREAS, the Lummi Business Council deems it essential to the peace, safety, morals, and general welfare of the Lummi Tribe to enact a comprehensive tobacco ordinance regulating sale and distribution of cigarettes and other tobacco products and levying an excise tax upon their distribution on the Lummi Indian Reservation; and,

WHEREAS, the Lummi Business Council has heretofore adopted Lummi Tobacco Ordinance, Resolution No. P-35, but now wishes to increase the number of cartons of cigarettes which may be sold to non-Indians,

NOW, THEREFORE, the Lummi Business Council does



hereby promulgate and enact the following amended tobacco ordinance to supersede any previous tobacco ordinance heretofore enacted.

**ORDINANCE NO. L-40**

Governing sale, distribution and
taxation of tobacco products
within the Lummi Indian Reservation

**Section 1. Title.**

This ordinance shall be known as the Lummi Tobacco Ordinance.

**Section 2. Definitions.**

As used in this ordinance, the following words and phrases shall each have the designated meaning unless a different meaning is expressly provided or the context is clearly indicated.

(1) "Tribe" shall mean the Lummi Tribe of the Lummi Indian Reservation.

(2) "Council" shall mean the Lummi Business Council.

(3) "Cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of the tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any material, except where such wrapper is wholly or in the greater part made of natural leaf tobacco in its natural state.

(4) "Tobacco Products" shall mean cigarettes, cigars, smoking tobacco, snuff, chewing tobacco, and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking.

(5) "Retail Selling Price" shall mean the ordinary,

customary or usual price paid by the consumer for each tobacco product, less the tax levied by this ordinance.

(6) "Wholesale Distribution Price" shall mean the price paid for each tobacco product by the Tribe together with all freight charges and other expenses incurred by the Tribe in their receipt and distribution.

(7) "Tobacco Outlet" shall mean a licensed tribal retail sales business selling tobacco products on trust land within the Lummi Indian Reservation.

(8) "Operator" shall mean an enrolled member of the Lummi Indian Tribe licensed by the Tribe to manage a tobacco outlet.

**Section 3. Establishment of Tobacco Outlets.**

The Council shall establish one or more tobacco outlets within the Lummi Indian Reservation as the Council in its sole discretion deems necessary to provide adequate service to consumers of cigarettes and tobacco products.

**Section 4. Nature of Outlet.**

Each tobacco outlet established hereunder shall be a tribal tobacco outlet and shall be managed for the Tribe by an Operator pursuant to a license granted by the Council hereunder, and shall also be managed pursuant to a federal Indian traders license as provided in Section 7 hereof.

**Section 5. Application for Tobacco Outlet License.**

Any enrolled member of the Lummi Tribe may apply upon an application form provided by the Council for a tobacco outlet license. The application shall state the name and address of the applicant and shall be signed by the applicant under oath.

**Section 6. Tobacco Outlet License.**

Upon approval of an application, the Council shall



issue the applicant a tobacco outlet license for a five-year period which shall entitle the operator to establish and maintain one tobacco outlet on the Lummi Indian Reservation. The license shall be renewable in such manner as the Council shall prescribe and shall be non-transferable.

**Section 7. Traders License.**

Within 30 days after receipt of a tobacco outlet license, an operator must apply to the Superintendent of the Western Washington Indian Agency for a Federal Indian Trader's License. Failure of an operator to apply for or to obtain a Federal Indian Trader's License shall be grounds for revocation of the operator's tobacco outlet license.

**Section 8. Tax Imposed.**

There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes in the amount of $.01 per package. The Council may levy an additional tax upon the distribution of cigarettes and other tobacco products as it deems desirable.

The excise tax levied hereunder shall be first a tax upon distribution of cigarettes and other tobacco products by the Tribe pursuant to Section 9 of this ordinance; provided, however, that failure to pay the tax at the time of such distribution shall not prevent tax liability from arriving [*sic*] by reason of another taxable event. The excise tax levied hereunder shall be added to the retail price of tobacco products sold to the ultimate consumer.

**Section 9. Wholesale Distribution.**

Wholesale distribution of tobacco products by the Tribe to a tobacco outlet shall be upon a cash basis for the wholesale distribution price which shall have added to it the excise tax levied in Section 8 hereof.

**Section 10. Tobacco Products Federally Restricted Tribal Property.**

The entire stock of tobacco products distributed hereunder shall remain federally restricted tribal property owned and possessed by the Tribe until sale to the ultimate consumer. Payment by the operator of the wholesale distribution price plus the excise tax as provided in Section 9 hereof shall entitle the operator to custody of distributed tobacco products for sale to the ultimate consumer, at the operator's sole risk in the event of any loss whatsoever.

**Section 11. Remuneration to Operator.**

As remuneration for managing a tobacco outlet, an operator shall be entitled to the gross revenue derived from sale of tobacco products distributed hereunder in excess of the wholesale distribution price and the excise tax levied hereunder.

**Section 12. Restricted Sales to Non-Indians.**

An operator may not sell more than three cartons of cigarettes per sale to a non-Indian. The Council may restrict sales of other tobacco products to non-Indians as to [*sic*] deems necessary.

**Section 13. Restricted Sales to Minors.**

An operator may not sell any tobacco products to any person under the age of 18 years.

**Section 14. Other Business by Operator.**

An operator may conduct another business simultaneously with managing a tobacco outlet for the Tribe. The other business may be conducted on the same premises and the operator shall not be required to maintain separate books of account for the other business.

**Section 15. Tribal Immunity — Liability — Credit.**

An operator shall not attempt or be authorized to waive the sovereign immunity of the Tribe from suit, nor



shall such operator attempt or be authorized to create any liability on behalf of the Tribe or to utilize tribal credit.

**Section 16. Operating Without License.**

No person shall operate a tobacco outlet on the Lummi Indian Reservation without having in effect a valid tobacco outlet license issued pursuant hereto.

**Section 17. Purchases.**

An operator shall purchase all tobacco products sold in his tobacco outlet from the Tribe.

**Section 18. Liability Insurance.**

An operator shall maintain liability insurance upon his premises in the sum of $100,000.00.

**Section 19. Revocation of Tobacco Outlet License.**

Failure of an operator to abide by the requirements of this ordinance and any additional requirement imposed by the Council will constitute grounds for revocation of the operator's tobacco outlet license as well as enforcement of the penalties provided in Section 20 below.

**Section 20. Violation — Penalties.**

Upon application by the Chairman of the Council, the tribal judge shall issue an order directing the tribal law enforcement officer to seize all tobacco products from wherever purchased and by whomever owned from any tobacco outlet being operated in violation of this ordinance. Within three (3) days of such seizure, after adequate notice to the operator of such outlet, a hearing shall be held in tribal court at which time the operator of such outlet shall be given the opportunity to present evidence in defense of his activities. If the tribal court shall determine by a preponderance of the evidence that such tobacco outlet was being operated in violation of this ordinance, the judge shall impose a fine of not less than $50.00 nor more than $250.00 in addition to the forfeiture of tobacco products described above.

**Section 21. Recovery of Taxes Owed.**

The Tribe shall have a cause of action in tribal court to recover any taxes owed and not paid to the Tribe in accordance with this or any previous ordinance.

**Section 22. Separability.**

If any provision of this ordinance or its application to any person or circumstance is held invalid, the remainder of this ordinance, or the application of the provision to other persons or circumstances is not affected.

**CERTIFICATION**

I certify as Secretary of the Lummi Business Council that the Lummi Business Council is composed of 11 members, 6 of whom, constituting a quorum, were present at a (regular) (special) meeting of the Council on August 30, 1974, held at Marietta, Washington, and that the foregoing Resolution was duly adopted at such meeting by a vote of 5 FOR and 0 AGAINST said Resolution.

/s/_____
Chairman

/s/_____
Tribal Secretary



**EXHIBIT 10.19 [to Pre-Trial Order]**

AFFIDAVIT OF RONALD C. TROSPER

STATE OF WASHINGTON )
) ss.
COUNTY OF KING )

RONALD L. TROSPER, being first duly sworn, on oath depose and says as follow:

**1. Qualifications As An Expert Witness.**

I am an economist and specialize in the area of American Indian economic development. I currently hold the position of Assistant Professor of Economics and Public Affairs at the University of Washington in Seattle, Washington. While at the University, I have taught the following courses: American Indian Economic Development Problems, Economics of Discrimination, Macro-Economics, Urban Economics, and Economic Development.

I received a Bachelor of Arts degree, magna cum laude, with a major in Social Studies from Harvard College in 1967. I received a Master of Arts in Economics at Harvard in 1970 and a PhD. in Economics at Harvard in 1974. The title of my PhD. dissertation at Harvard was "The Economic Impact of the Allotment Policy on the Flathead Indian Reservation."

My honors and fellowships include the following: Phi Beta Kappa, 1967; Woodrow Wilson Fellowship, 1967; Henry Fellowship, 1967; Danforth Graduate Fellowship, 1967; Ford Foundation Advance Study Fellowship for American Indians, 1972. I am a member of the American Economic Association and the Western Economic Association, was a special consultant on economic development to the American Indian Policy Review Commission in 1975-76, was a consultant to the Swinomish Tribal Community in 1975, and a consultant to the Confederated Salish and Kootenai Tribes in 1971 and 1972.

My publications include a discussion on past

developments and future prospects for ethnic minority groups in American Economic Review, May, 1975; Title I of the Indian Self-Determination and Education Assistance Act of 1975, 3 Am.Ind.L.Rev. 361 (1976); Native American Boundary Maintenance: The Flathead Indian Reservation, Montana: 1860-1970, 3 Ethnicity 256 (1976).

**2. Economic Effects of Imposition of the State Cigarette and Tobacco Products Tax.**

Counsel for the Colville, Lummi, and Makah Tribes, plaintiffs in this action, have requested me to study the economic impact of imposition of the State's Cigarette and Tobacco Products Tax and to express my opinion as to the probable economic results. I have on numerous occasions spoken with counsel for the plaintiffs Tribes and am familiar with the cigarette taxing ordinances of the Makah, Lummi, and Colville Tribes. I am also familiar with the State's Cigarette and Tobacco Products Tax and have examined the Jenkins Act Reports showing the volume of cigarette sales on their respective Reservations over the past years. I am familiar with the economic conditions on the plaintiffs' Reservations and with economic conditions on Indian reservations generally. In addition, I have examined and am familiar with the economic literature on the effect of differential tax rates on cigarette sales in various jurisdictions.

It is my opinion that if the State's cigarette tax of $.16 per pack is added to the price of cigarettes sold by the tribal outlets on the Colville, Lummi, and Makah Indian Reservations, the volume of cigarette sales on those Reservations will fall drastically. The basis for my opinion is as follows.

The State imposes a Cigarette and Tobacco Products Tax of $.16 per package of cigarettes sold. The Colville Indian Tribes imposes a cigarette tax of $.04 per package sold and the Lummi and Makah Indian Tribes impose a cigarette tax of $.05 per package of cigarettes sold. At the present time, the State's cigarette tax is imposed on all sales of cigarettes off the reservation, but has not been



successfully enforced on the reservations. If the State's Cigarette and Tobacco Products Tax were superimposed on the respective tribal taxes on cigarettes, it is clear that cigarettes sold on the Colville Reservation would bear a total excise tax burden of $.20 per package and cigarettes sold on the Lummi and Makah Reservations would bear a tax burden of $.21 per package. (For present purposes, this analysis does not include the impact of the State's sales tax. That is discussed separately below.)

The question of what will happen to the volume of cigarette sales on the reservations if the State tax were superimposed on the tribal tax can be described as a textbook case. Paul Samuelson and other economists point out that individual firms faced a highly "elastic" demand curve with respect to their own price in a competitive market. P. SAMUELSON, ECONOMICS 432-33 (8th Ed. 1970). A highly elastic demand curve means that large changes in the volume of sales will result from small changes in price. State and tribal cigarette taxes in this case determine the price differences between Indian and non-Indian retail cigarette outlets. For Indian retailers, the dramatic result of an elastic demand curve is that a small change in price will create a large change in sales volume.

It was established by Alexander C. Wiseman in his 1968 PhD. dissertation in economics at the University of Washington, entitled "The Demand For Cigarettes In the United States: Implications For State Tax Policy," that people will cross boundaries between tax jurisdictions to purchase cigarettes. Mr. Wiseman used data on cigarette consumption for 47 states and the District of Columbia for the years 1954 to 1965. This study enabled him to establish that price differences between Washington and Oregon in 1966 caused some 348,000 cartons to be purchased in Oregon by Washington residents in that year. *Id.* at 56. He also estimated that between Connecticut and New Hampshire, net sales to non-residents constituted about 14% of total sales, while for Vermont and Rhode Island between 9% and 10% of net sales were to

non-residents. *Id.* at 74. In 1966, the price difference between New York and Connecticut was about $.05 per pack and between Massachusetts and New Hampshire about $.07 per pack.

Mr. Wiseman's study confirms that people will travel to avoid paying cigarette taxes. The Connecticut/New Hampshire and Vermont/Rhode Island figures indicate that consumers were responding to differences of $.05 and $.07 per pack respectively. In Washington State, residents are responding to what is now an $.11 or $.12 cigarette tax differential per pack on the three plaintiffs Reservations. The large volume of cigarettes sold on these Reservations as revealed by the Jenkins Act Reports confirms that Washington consumers are in effect responding to price differences in precisely the manner that economic textbooks predict.

At present, the 5% State sales tax is not collected on sales of cigarettes on the Reservations, but is collected on sales of cigarettes off the Reservations. Thus, at present a non-Indian purchaser buying cigarettes on the Reservations is responding to a price differential that is several cents larger than the $.11 or $.12 excise tax difference described above. If the State's sales tax were enforced on the Reservations, but the State's Cigarette and Tobacco Products Tax were not enforced, the price differential would be approximately $.11 and $.12 as outlined above. If the Cigarette and Tobacco Products Tax were enforced, the present differential would be eliminated and a price differential against Indian sellers would be imposed. The differential created by the cigarette tax alone would be increased if the State sales tax were also imposed.

If non-Indians travel to the Reservations and purchase cigarettes there to benefit from the tax differential, they will cease such travel if the differential disappears or reverses direction. At present, non-Indian purchasers buying cigarettes on the Reservations have a net savings of $1.10 or $1.20 per carton from the cigarette tax differential alone. If the State's Cigarette and Tobacco



Products Tax were imposed, this savings would be turned into an additional expense, over and above the price of off-reservation cigarettes, of $.40 or $.50 per carton, a cost increase of 38% to 40% for current purchasers on the Reservations. If the two excise taxes were applied on the Reservations, the Indian tribal outlets would have a price disadvantage and could no longer successfully compete with nearby cigarette retailers located off the Reservations. The tribal outlets would probably have trouble covering basic operating expenses necessary to continue in business. At a minimum, it is certain that the large volumes of cigarettes sold at the Colville and Lummi Reservations to non-Indians would disappear. Imposition of the State sales tax as well would, of course, increase the competitive disadvantage of the tribal outlets.

/s/_____
RONALD L. TROSPER

[Jurat omitted in printing]

## STATE'S MOTION FOR PARTIAL NEW TRIAL

Filed May 22, 1978
[Caption Omitted in Printing]

Pursuant to Fed. R. Civ. P. 59(a)(2), the defendants hereby move for a partial new trial, the new trial to be limited to the issue of the power of the State of Washington to impose (1) its cigarette tax (chapter 82.24 RCW and the administrative regulations promulgated thereunder) upon non-Indian purchasers from Indians and (2) its sales tax (chapter 82.08 and the administrative regulations promulgated thereupon) with respect to these same transactions.

As grounds for this motion, defendants rely upon two decisions of the United States Supreme Court which clarify the source, nature, and limits of tribal power over Indians and non-Indians, but which were rendered after the decision of this Court and were, accordingly, not available to this Court in its consideration of this case. Those decisions are *Oliphant v. Suquamish Tribe*, ____ U.S. ____ (46 LW 4210, March 6, 1978), and *United States v. Wheeler*, ____ U.S. ____ (46 LW 4243, March 22, 1978). Defendants further rely upon a decision of the 10th Circuit, rendered February 17, 1978, *Ute Indian Tribe v. State Tax Commission of the State of Utah*, No. 76-1602.

As will be shown in the brief of defendants to be filed herein, the grounds relied upon by the majority in that portion of its decision as to which a new trial is being requested are completely inconsistent with those decisions.

DATED this 19th day of May, 1978.

/s/_____
SLADE GORTON
Attorney General

/s/_____
MATTHEW J. COYLE
Assistant Attorney General



## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed July 12, 1978
[Caption Omitted in Printing]

1. Notice is hereby given that the State of Washington, Charles Hodde, individually and as Director of the Washington Department of Revenue, R. Y. Woodhouse, individually and as Director of the State of Washington Department of Licensing, and Robert S. O'Brien, individually and as Washington State Treasurer, defendants above named, hereby appeal to the Supreme Court of the United States from that portion of the final judgment of the three-judge United States District Court for the Eastern District of Washington, entered May 10, 1978, granting plaintiff Indian Tribes:

(1) A declaratory judgment that the imposition of the State of Washington motor vehicle excise tax under RCW 82.44 and its mobile homes, travel trailers and campers excise tax under RCW 82.50, the administrative regulations promulgated thereunder and any enforcement thereof against any of the tribes or their reservation resident members regarding motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on their reservations are unlawful as an infringement of their rights secured under federal statutes and treaties.

(2) Granting a declaratory judgment that the State of Washington's exercise of civil and criminal jurisdiction under RCW 37.12, the regulations promulgated thereunder, and enforcement thereof against the Lummi Indian Tribe or the Makah Indian Tribe or any of their reservation's resident members are unlawful as a denial of equal protection under the United States Constitution.

(3) Permanently enjoining the State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from imposing the State of Washington motor vehicle excise tax on its mobile homes, travel trailers and campers

excise tax upon any of the Tribes or their reservation resident members regarding motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on the reservation.

2. This appeal is taken pursuant to 28 U.S.C. § 1253.

DATED this 10th day of July, 1978.

SLADE GORTON, Attorney General
State of Washington

By:/s/_____
MATTHEW J. COYLE
Assistant Attorney General
Attorneys for Appellants-
Defendants

[Proof of Service Omitted in Printing]



## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed August 14, 1978
[Caption Omitted in Printing]

1. Notice is hereby given that the State of Washington, Charles Hodde, individually and as Director of the Washington Department of Revenue, Jack G. Nelson, individually and as Director of the State of Washington Department of Licensing, and Robert S. O'Brien, individually and as Washington State Treasurer, defendants above named, hereby appeal to the Supreme Court of the United States from that portion of the final judgment of the three-judge United States District Court for the Eastern District of Washington, entered May 10, 1978, granting plaintiff Indian Tribes:

(1) A declaratory judgment that the imposition of the State's cigarette taxing scheme under RCW 82.24, the administrative regulations promulgated thereunder, and any enforcement thereof by seizure or otherwise against any of the Tribes or their respective retail dealers are unlawful in that the State's cigarette taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government; and

(2) Permanently enjoining the State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from imposing the State's cigarette taxing scheme against any of the Tribes or their retail dealers.

2. The above-named defendants moved the United States District Court for the Eastern District of Washington for a partial new trial on that portion of its final judgment stated above. Said motion for partial new trial was denied on July 10, 1978.

3. This appeal is taken pursuant to 28 U.S.C. § 1253.
DATED this 10th day of August, 1978.

SLADE GORTON, Attorney General
State of Washington

RICHARD H. HOLMQUIST
Sr. Assistant Attorney General

By/s/ _____
MATTHEW J. COYLE
Assistant Attorney General
Attorneys for Appellants-
Defendants.

[Proof of Service Omitted in Printing]



## AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed September 8, 1978
[Caption Omitted in Printing]

1. Notice is hereby given that the State of Washington, Charles Hodde, individually and as Director of the Washington Department of Revenue, Jack G. Nelson, individually and as Director of the State of Washington Department of Licensing, and Robert S. O'Brien, individually and as Washington State Treasurer, defendants above named, hereby appeal to the Supreme Court of the United States from that portion of the final judgment of the three-judge United States District Court for the Eastern District of Washington, entered May 10, 1978, granting plaintiff Indian Tribes:

(1) A declaratory judgment that the imposition of the State's cigarette taxing scheme under RCW 82.24, the administrative regulations promulgated thereunder, and any enforcement thereof by seizure or otherwise against any of the Tribes or their respective retail dealers are unlawful in that the State's cigarette taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government; and

(2) Permanently enjoining the State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from imposing the State's cigarette taxing scheme against any of the Tribes or their retail dealers.

(3) A declaratory judgment that the imposition of the State of Washington motor vehicle excise tax under RCW 82.44 and its mobile homes, travel trailers and campers excise tax under RCW 82.50, the administrative regulations promulgated thereunder and any enforcement thereof against any of the tribes or their reservation resident members regarding motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on

their reservations are unlawful as an infringement of their rights secured under federal statutes and treaties.

(4) Granting a declaratory judgment that the State of Washington's exercise of civil and criminal jurisdiction under RCW 37.12, the regulations promulgated thereunder, and enforcement thereof against the Lummi Indian Tribe or the Makah Indian Tribe or any of their reservation's resident members are unlawful as a denial of equal protection under the United States Constitution.

(5) Permanently enjoining the State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from imposing the State of Washington motor vehicle excise tax on its mobile homes, travel trailers and campers excise tax upon any of the Tribes or their reservation resident members regarding motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on the reservation.

2. The above-named defendants moved the United States District Court for the Eastern District of Washington for a partial new trial on that portion of its final judgment contained in paragraph 1(1) and 1(2) above. Said motion for partial new trial was denied on July 10, 1978.

3. This appeal is taken pursuant to 28 U.S.C. § 1253.

DATED this 8th day of September, 1978.

SLADE GORTON, Attorney General
State of Washington

By:/s/_____
Matthew J. Coyle
Assistant Attorney General

Attorneys for Appellants-Defendants.

[Proof of Service Omitted in Printing]



SUPREME COURT OF THE UNITED STATES

No. 78-630

WASHINGTON, et al.,

*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, et al.

APPEAL from the United States District Court for the Eastern District of Washington.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

February 21, 1979

# CAUSE NO. 3909 BELOW— THE *YAKIMA* CASE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

Civil No. 3909

COMPLAINT

[Filed July 18, 1973]

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

STATE OF WASHINGTON,

*Defendant.*

## COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

The United States of America, by Dean C. Smith, United States Attorney for the Eastern District of Washington, acting under authority of 25 USCA §175 and of the Attorney General and at the request of the Secretary of the Interior, complains and alleges as follows:

### JURISDICTION AND CAUSE OF ACTION

1. This court has jurisdiction by reason of the fact that the United States is plaintiff 28 USC §1345.

2. The United States brings this action on behalf of the Confederated Bands and Tribes of the Yakima Indian Nation, hereinafter called "The Yakima Indian Nation".

Plaintiff entered into a Treaty with the Yakima Indian Nation on June 9, 1855. This Treaty was ratified on August 8, 1859. Among other things this Treaty established the dependence of the Yakima Indian Nation



on plaintiff, the recognition of this nation and that the property of this nation should be free from levy or attachment.

3. This is a civil action seeking declaratory judgment and injunctive relief against wrongful and unlawful actions undertaken and being undertaken, under color of law, by George Kinnear, Director of the State of Washington, Department of Revenue, his agents, officers, and employees to deprive, to diminish and to effect diminution and extinguishment of certain constitutional, treaty and legal rights of the Yakima Indian Nation to engage in Indian commerce. Declaratory judgment and injunctive relief is also sought against said defendant, its agents, officers and employees for their wrongful and unlawful acts and actions to tax and to levy taxes upon, to seize, to alienate, to encumber, and to regulate the real and personal properties of the Yakima Indian Nation and to levy against and restrict the trade and commerce of the Yakima Indian Nation and its personal properties, and to deprive the Yakima Indian Nation of its properties without due process of law and without lawful authority.

### IDENTIFICATION OF THE PARTIES AND PARTY IN INTEREST

4. Plaintiff is the United States of America.

5. Defendant, State of Washington was admitted to the United States of America pursuant to Enabling Act of February 22, 1889 and the President's Proclamation of November 11, 1889.

6. The Yakima Indian Nation is an Indian tribe or Indian Nation established by Treaty with the United States of America, entitled *"Treaty with the Yakimas"*, 12 Stat. 951. The Yakima Indian Nation and its governing bodies are recognized by the Secretary of Interior. The Yakima Indian Nation has a membership of over six thousand, the majority of which live on the Yakima Indian Reservation which is located within the exterior boundaries of the State of Washington. This reservation was

reserved for the Yakima Indian Nation in the *"Treaty with the Yakimas"*, 12 Stat. 951. That the State of Washington has not assumed jurisdiction over the trust lands on the Yakima Reservation in any manner that would effect the outcome of this action.

Within the exterior boundaries of the Yakima Indian Reservation the Yakima Indian Nation in the exercise of its governmental powers and in pursuance of a duly enacted tribal ordinance, approved by the Secretary of Interior, does license and tax the sale of cigarettes and other tobacco products. Its licensees and their employees are all members of the Yakima Indian Nation enrolled under 18 USC §601 and their premises are all located on trust or restricted lands within the exterior boundaries of the Yakima Indian Nation. The Yakima Indian Nation also operates a tribal enterprise which regularly purchases cigarettes from a wholesale dealer in Idaho, and orders their delivery to a building on trust property on the Yakima Indian Reservation by means of interstate common carrier or transport. That thereafter the Yakima Indian Nation sells and delivers these cigarettes to its member licensees to their places of business. That thereafter these licensees resell these cigarettes at retail. That the Yakima Nation receives 1¢ per pack tax and charges 2¢ per pack mark-up on each pack so sold. These revenues are used by the Yakima Nation for general tribal programs.

## CAUSE OF ACTION

7. That on May 5, 1972, defendant, its agents, officers and employees classified the Yakima Indian Nation as a taxpayer and assessed a tax of $304,582.40 against the Yakima Indian Nation together with a penalty of $304,582.40 and interest. That a copy of said attachment is attached hereto and marked Exhibit "A" and made a part of this complaint.

8. That thereafter on November 30, 1972 the defendant, its agents, officers and employees did issue a



warrant for unpaid taxes claiming an indebtedness from the Yakima Indian Nation to the defendant in the amount of $650,333.88. That this warrant levied upon the real and personal property of the Yakima Indian Nation. A copy of said warrant is marked Exhibit "B" attached hereto and made a part hereof.

9. That defendant, its agents, officers and employees on or about December 19, 1972 issued a Notice and Order to Withhold and Deliver (continuing levy) to Garrett Truck Lines, Inc. and other like common carriers regularly engaged in interstate commerce in the transporting of goods in established interstate highway transport routes that serve the Yakima Indian Reservation. That this notice and order demanded that all said carriers withhold from and deliver to the Washington State Department of Revenue all personal properties of the Yakima Indian Nation. That said notice and order is a continuing levy and provides that if the company should fail or refuse to comply that a judgment for $650,333.88 would be taken against them. That a copy of said notice and order is attached hereto marked Exhibit "C" and made a part hereof.

10. That pursuant to said notice and order Garrett Truck Lines did inform defendant that it had certain goods belonging to the Yakima Nation and the Department of Revenue seized these goods from regular interstate shipment (i.e. tobacco products) and sold them. That because Garrett Truck Lines and other interstate carriers and defendant have said the same continuing procedures would be followed, the Yakima Indian Nation has been forced to cease doing business in this tribal enterprise.

11. That the foregoing action of the defendant, its agents, officers and employees is unlawful and improper in the following respects:

a. Defendant's actions are an unconstitutional interference with Indian commerce.

b. Defendant is unlawfully exceeding its jurisdiction.

c. Defendant's actions are an unconstitutional interference with commerce with and upon an Indian Reservation.

d. Defendant's actions are an unlawful interference with plaintiff as Congress has pre-empted the field of regulation of the commerce in and to Indian Reservations.

e. Defendant's actions are an unlawful interference with the internal affairs of the Yakima Indian Nation.

f. Defendant's actions are an unlawful levy and attachment of properties of the Yakima Indian Nation which are free from levy and attachment under treaty and under the express terms under which the State of Washington gained admission to the Union.

g. Defendant's actions are destructive of the commerce of the Yakima Indian Nation and fail to provide the Yakima Nation with due process of law.

12. The plaintiff and the Yakima Indian Nation do not have an adequate remedy at law because the amount of the assessment grossly exceeds the Yakima Indian Nation's revenue from the handling of cigarettes and it is therefore impossible for the tribe to pay the tax and sue for recovery.

13. That an actual controversy exists between the plaintiff on one hand and the defendant on the other as to the nature and extent of the Yakima Indian Nation's right to engage in commerce without taxation, levy or attachment.

WHEREFORE, plaintiff prays that this court, after hearing:

a. Declare that the Yakima Indian Nation's activity in trade and commerce, as it involves the purchase at wholesale of cigarettes for delivery to the Yakima Indian Reservation for the Yakima Nation's use, including commercial disposition of such commodities is an activity protected against any interfer-



ence, regulation, imposition of taxes or levy, seizure or sale of properties involved or incident thereto, by any allegation or exercise of authority by defendant and its agents, officers and employees.

b. Declare that the "Order Assessing Tax and Notice of Assessment" and "Warrant for Unpaid Taxes" issued by defendant against the Yakima Nation constitutes an unlawful levy of taxes.

c. Declare that the several "Notice and Order to Withhold and Deliver '(continuing levy) Orders" issued by defendant against numerous companies, businesses, and corporations regularly engaged and doing business in interstate commerce and transport are invalid and unenforceable for levying upon, attaching, or commanding delivery of the Yakima Indian Nation's personal or other properties to the Department of Revenue of the State of Washington.

d. Issue preliminary and permanent injunctions against defendant, its agents, officers and employees enjoining them from engaging in any action or acting in any manner to stop, prevent, or interfere with Yakima Indian Nation's transactions and business activities in Indian commerce, and from acting in any manner to stop, prevent or interfere with the transport or delivery of properties purchased by the Yakima Indian Nation for delivery to the Yakima Indian Reservation, and enjoining defendant from acting in any manner to levy taxes upon the properties of the Yakima Nation when transported or moved in commerce, and enjoining defendant from acting in any manner to seize or to receive into its possession any of the properties of the Yakima Indian Nation being moved or which may be moved or transported in commerce, and enjoining defendant from acting in any manner to enforce, or give effect to, any assessments, levies, taxation orders, warrants, or claims against the real or personal properties of the Yakima Indian Nation heretofore issued by defendant or which may be hereafter issued to restrict, prevent or interfere with Yakima Indian Nation's transactions or business in securing delivery of commodities in Indian commerce.

For such other and further relief as the court deems just and equitable.

/s/_____
DEAN C. SMITH
United States Attorney

851 U.S. Courthouse
P.O. Box 1494
Spokane, Washington 99210

* * * *

[Exhibit A (Tax Assessment) omitted in printing]

[Exhibit B (Tax Warrant) omitted in printing]

[Exhibit C (Notice and Order to Withhold and Deliver) omitted in printing]



## PETITION FOR DETERMINATION BY A THREE JUDGE COURT

Filed July 19, 1973
[Caption omitted in printing]

COMES Now Dean C. Smith, United States Attorney for the Eastern District of Washington on behalf of the plaintiff United States of America and petitions the court for a determination in this cause by a three judge court under the provisions 28 USC §§2281 and 2284.

This petition is based upon the allegations of the complaint in which the relief requested is a preliminary injunction as well as a permanent injunction restraining the enforcement of a state statute. Such relief is requested on the grounds of the unconstitutionality of a state statute.

DATED July 19, 1973.

/s/_____
Dean C. Smith
United States Attorney

## CERTIFICATE REQUESTING THREE-JUDGE COURT

Filed July 20, 1973
[Caption omitted in printing]

To: The Honorable Richard H. Chambers, Chief Judge
United States Court of Appeals for the Ninth Circuit

The plaintiff has filed its complaint and application for convening a three-judge court under 28 USC §2281 et seq. The prayer of the complaint asks for an injunction against the enforcement of the revenue laws of the State of Washington on the Yakima Indian Reservation as an unconstitutional interference with interstate commerce and deprivation of property without due process of law.

I certify that a three-judge court is necessary and request that you constitute such a court in this district by the designation of the required Circuit Court Judge and additional District Court Judge.

DATED this 20th day of July, 1973.

/s/_____
Charles L. Powell
United States District Judge



## TEMPORARY RESTRAINING ORDER

Entered November 5, 1973
[Caption omitted in printing]

THIS MATTER having come on for hearing upon plaintiff's Motion for Temporary Restraining Order, the plaintiff being represented by Dean C. Smith, United States Attorney for the Eastern District of Washington, and the defendant being represented by William Dexter, Assistant Attorney General for the State of Washington, and the Court having considered the affidavits and records herein and after hearing argument and being fully advised in the premises

The Court hereby finds as follows: The Yakima Indian Nation and the individual licensed retail dealers in cigarettes on the reservation have suffered and are suffering serious losses in revenue constituting irreparable damage, necessitating the entry of a temporary restraining order to restore the status quo which existed at the time the defendant State of Washington instituted the program of seizure of cigarettes and tobacco products.

Based upon the foregoing findings,

IT IS ORDERED that the defendant, State of Washington, its officers, agents and servants are hereby restrained until the determination by this Court of plaintiff's Motion for Preliminary Injunction or until otherwise ordered by the Court from engaging in any action or acting in any manner to assess a tax upon or seize any cigarettes, tobacco products or their containers, or confiscate any such cigarettes, tobacco products or their containers being shipped or delivered to the Yakima Indian Nation by licensed carrier in interstate commerce from outside the State of Washington or distributed by the Yakima Nation on the Reservation to its licensed retailers for resale on trust or restricted land within the exterior boundaries of the Yakima Indian Reservation.

DATED November 5, 1973.

/s/_____
Charles L. Powell
United States District Judge

Presented by:

/s/_____
Dean C. Smith
United States Attorney



## COMPLAINT IN INTERVENTION

Filed April 24, 1974
[Caption Omitted in Printing]

COMPLAINT IN INTERVENTION
FOR DECLARATORY JUDGMENT,
DAMAGES AND INJUNCTION

The Confederated Bands and Tribe of the Yakima Indian Nation, hereinafter called "Yakima Nation", a tribe or nation of Indians recognized by the United States and its Secretary of Interior, for its complaint in intervention as a party plaintiff alleges:

### JURISDICTION AND CAUSE OF ACTION

1. This court has jurisdiction by virtue of:

a. 28 U.S.C. § 1345, in that the United States brings this action on its own behalf and on behalf of the Yakima Nation, a federally recognized Indian tribe in connection with its administration of Indian affairs.

b. 28 U.S.C. § 1331, in that the matter in controversy involves the rights of said plaintiff Yakima Nation which has a value in excess of $10,000, exclusive of interest and costs, and are claimed to exist and to be secured under the Constitution, laws and treaties of the United States.

c. 28 U.S.C. § 1343 (3) and (4), in that the Yakima Nation alleges that Defendant State of Washington, and [*sic*] has, under color of state law, regulation, custom and usage, deprived them of rights secured to them in the treaties cited in paragraph 5 and under the Constitution of the United States, and those tribes seek equitable relief and damages for that deprivation.

d. 28 U.S.C. § 1362, as the Yakima Nation has a governing body duly recognized by the Secretary of the Interior in that this action in intervention is brought on its own behalf alleging violations of its rights under the Constitution, laws and treaties of the United States.

2. This is a civil action seeking declaratory judgment,

damages and injunctive relief against wrongful and unlawful actions undertaken and being undertaken, under color of law, by defendant, State of Washington, its officials, officers, and employees to deprive, to diminish and to effect diminution and extinguishment of certain constitutional, treaty, legal and inherent rights of the Yakima Indian Nation to engage in interstate commerce and in Indian commerce. Declaratory judgment, damages and injunctive relief is also sought against defendant State of Washington, its officials, officers and employees, their wrongful and unlawful acts and actions to tax and to levy taxes upon, to seize, to alienate, to encumber, and to regulate the real and personal properties of the Yakima Indian Nation and to levy against and restrict the trade and commerce of the Yakima Indian Nation and its personal properties, and to deprive the Yakima Indian Nation of its properties without due process of law and without lawful authority.

## IDENTIFICATION OF THE PARTIES AND PARTY IN INTEREST

3. Plaintiff is the United States of America.

4. Defendant is a state that was admitted to the United States of America pursuant to Enabling Act of February 22, 1889 and the President's Proclamation of November 11, 1889.

5. Plaintiff-Intervenor, the Yakima Indian Nation, is an Indian tribe or Indian Nation established by Treaty with the United States of America *Treaty with the Yakimas*, 12 Stat. 951. The Yakima Indian Nation and its governing bodies are recognized by the Secretary of Interior. The Yakima Indian Nation has a membership of over six thousand, the majority of which live on the Yakima Indian Reservation which is located within the exterior boundaries of the State of Washington. This reservation has approximately 1,387,505 acres within its exterior boundary, of which all but approximately 270,895 are held in trust or restricted status by the United States



of America as trustee for the Yakima Indian Nation, its members or other Indians. This reservation was reserved for the Yakima Indian Nation in the *Treaty with the Yakimas*, 12 Stat. 951. That the State of Washington has not assumed jurisdiction over the trust lands on the Yakima Reservation in any manner that would effect the outcome of this action.

Within the exterior boundaries of the Yakima Indian Reservation the Yakima Indian Nation in the exercise of its governmental powers does license and tax the sale of cigarettes and other tobacco products. Its licensees and their employees are all members of the Yakima Indian Nation enrolled under 25 USC 601 and their premises are all located on trust or restricted lands within the exterior boundaries of the Yakima Indian Nation. The Yakima Indian Nation also operates a tribal enterprise which regularly purchases cigarettes from a wholesale dealer in Idaho, and orders their delivery to a building on trust property on the Yakima Indian Reservation by means of interstate common carrier or transport. That thereafter the Yakima Indian Nation sells and delivers these cigarettes to its member licensees to their places of business. That thereafter these licensees resell these cigarettes at retail. That the Yakima Nation receives a tax and a return on each pack so sold. These revenues are used by the Yakima Nation for general tribal programs.

## CAUSE OF ACTION

6. That on May 5, 1972, defendant, its officials, officers and employees classified the Yakima Indian Nation as a taxpayer and assessed a tax of $304,582.40 against the Yakima Indian Nation together with a penalty of $304,582.40 and interest. This is an assessment of over 32¢ per pack on each and every pack purchased and sold by the Yakima Indian Nation during the months of March and April 1972. That a copy of said attachment is attached to plaintiff's complaint, marked Exhibit "A" and made a part of this complaint by this reference.

7. That thereafter on November 30, 1972 the defendant, its officials, officers and employees did swear out and issue a warrant for unpaid taxes claiming an indebtedness from the Yakima Indian Nation to the defendant in the amount of $650,333.88. That this warrant wrongfully and unlawfully levied upon the real and personal property of the Yakima Indian Nation. A copy of said warrant is attached to plaintiff's complaint marked Exhibit "B" and made a part of this complaint by this reference.

8. That defendant, its officials, officers and employees on or about December 19, 1972 issued a Notice and Order to Withhold and Deliver (continuing levy) to Garrett Truck Lines, Inc. and other like common carriers regularly engaged in interstate commerce, hauling, shipping, transport and transportation of goods in established interstate highway transport routes that would serve the Yakima Indian Reservation. That this notice and order demanded that all said carriers withhold from and deliver to the State Department of Revenue all personal properties of the Yakima Indian Nation. That said notice and order is a continuing levy and provides that if the company should fail or refuse to comply that a judgment for $650,333.88 would be taken against them. That a copy of said notice and order is attached to plaintiff's complaint marked Exhibit "C" and made a part of this complaint by this reference.

9. That pursuant to said notice and order Garrett Truck Lines did inform defendant that they had certain goods belonging to the Yakima Nation and defendant through its Department of Revenue seized these goods from regular interstate shipment (i.e. tobacco products) and sold them. That because Garrett Truck Lines and other interstate carriers and defendant have said the same continuing procedure would be followed, the Yakima Indian Nation ceased doing business in this tribal enterprise until such time as a temporary restraining order was granted by this court.



10. That during this period, plaintiff-intervenor lost an amount of $15,268.56 per month in income because of this action by the State, its agents and servants and will continue to lose a larger sum during any period that its operation must cease.

11. That the foregoing action of the defendant, its officials, officers and employees is unlawful and improper in the following respects:

A. Defendants actions are an unconstitutional interference with Indian and interstate commerce.

B. Defendant is attempting to make the Yakima Indian Nation a taxpayer contrary to state and federal law.

C. Defendant is unlawfully exceeding its jurisdiction.

D. Defendant's actions are an unconstitutional interference with commerce to and upon Indian Reservation.

E. Defendant's actions are an unlawful interference with plaintiff as Congress has pre-empted the field of regulation of the commerce of cigarettes in and to Indian Reservations.

F. Defendant's actions are an unlawful interference with the internal affairs and inherent sovereignty of the Yakima Indian Nation.

G. Defendant's actions are an unlawful levy and attachment of properties of the Yakima Indian Nation which are free from levy and attachment under treaty and under the express terms of Defendant's admission to the Union.

H. Defendant's actions are unlawfully confiscatory, destructive of the commerce of the Yakima Indian Nation and fail to provide the Yakima Nation with due process of law or equal protection of the laws pursuant to the United States Constitution.

12. The plaintiff and the Yakima Indian Nation do not have an adequate remedy at law because the amount of the assessment as compared to the margin collected that the payment of the tax and suing for relief is not possible.

13. That an actual controversy exists between the

plaintiff on one hand and the defendant on the other as to the nature and extent of the Yakima Indian Nation's right to engage in interstate commerce without taxation, levy or attachment.

WHEREFORE, plaintiff's pray that this court, after hearing:

A. Declare that the Yakima Indian Nation's activity in trade and commerce, as involves and is characterized by the purchase of wholesale saleable commodities (such as cigarettes) by plaintiff in places outside the State of Washington, with shipment or transport in delivery of such commodities being made by interstate common carrier of companies licensed and engaged in contracts and servicing established interstate commerce route for delivers [*sic*] to the Yakima Indian Reservation for the Yakima Nation's use, including commercial disposition, of such commodities and properties, are activities protected against any interference, imposition of taxes or levy, seizure or sale of properties involved or incident thereto, by any allegation or exercise of authority by defendants, the State of Washington, and its officials, officers and employees.

B. Declare that the "order Assessing Tax and Notice of Assessment" and "Warrant for Unpaid Taxes" issued by defendants against the Yakima Nation constitutes an unlawful levy of taxes and false claim of tax indebtedness.

C. Declare that the several "Notice and Order to Withhold and Deliver (continuing levy)" issued by defendants against numerous companies, businesses, and corporations regularly engaged and doing business in interstate commerce and transport are invalid and unenforceable for levying upon, attaching, or commanding delivery of plaintiffs' personal or other properties to the Department of Revenue of the State of Washington.

D. Issue preliminary and permanent injunctions against defendant, its officials, officers and employees enjoining said defendants from engaging in any action or acting in any manner to stop, prevent, or interfere with



Yakima Indian Nation's transactions and business activities in Indian commerce and interstate commerce, and from acting in any manner to stop, prevent or interfere with the transport or delivery of properties purchased by plaintiffs out of state for delivery to the Yakima Indian Reservation, and enjoining defendants from acting in any manner to levy taxes upon the properties of the Yakima Nation when transported or moved in interstate commerce of Indian commerce, and enjoining defendants from acting in any manner to seize or to receive into their possession any of properties of the Yakima Indian Nation being moved or which may be moved or transported in Indian or interstate commerce, and enjoining defendants from acting in any manner to enforce, or give effect to, any assessments, levies, taxations orders, warrants, or claims against the real or personal properties of the Yakima Indian Nation heretofore issued by defendant or which may be hereafter issued to restrict, prevent or interfere with Yakima Indian Nation transactions or business in securing delivery of properties by interstate commerce or by engaging in Indian commerce.

E. For damages for the cession of tribal enterprise in an amount to be ascertained at trial of this cause.

F. For such other and further relief as the court deems just and equitable.

/s/_____
James B. Hovis
Attorney for Plaintiff-
Intervenor

## ORDER GRANTING PRELIMINARY INJUNCTION

Entered September 6, 1974
[Caption Omitted in Printing]

THIS MATTER having come on for hearing upon plaintiff's application for issuance of a preliminary injunction, and on the complaint of plaintiff, the plaintiff being represented by Dean C. Smith, United States Attorney for the Eastern District of Washington, the defendant being represented by William D. Dexter, Assistant Attorney General for the State of Washington, and the plaintiff-intervenor being represented by James B. Hovis, Attorney at Law, and the Court having considered the affidavits and records herein and after hearing argument and being fully advised in the premises, and it appearing to the Court that in all probability the plaintiff will prevail upon the merits, and that the Yakima Indian Nation and its licensed Indian retailers have suffered and will continue to suffer serious losses in revenue constituting irreparable damage necessitating the entry of a preliminary injunction,

The stipulated facts contained in the Agreed Pre-Trial Order filed herein on September 3, 1974 are adopted by the Court as its findings in support of this order.

IT IS HEREBY ORDERED that defendant State of Washington, its officers, agents, servants, employees and attorneys, and those in active concert or participation with them, are hereby enjoined and restrained from engaging in any action or acting in any manner against the Yakima Indian Nation to collect or levy a cigarette tax on any cigarettes or tobacco products being shipped or delivered to the Yakima Indian Nation by licensed carrier in interstate commerce from outside the State of Washington and which are distributed by the Yakima Indian Nation on the Yakima Indian Reservation to its licensed retailers for resale on trust or restricted land within the exterior



boundaries of the Yakima Indian Reservation pending the determination of this action.

DONE BY THE COURT this 6th day of September, 1974.

/s/_____
John F. Kilkenny
United States Circuit Judge

/s/_____
William G. East
United States District Judge

/s/_____
Howard B. Turrentine
United States District Judge

* * * *

## AMENDED COMPLAINT

Filed October 4, 1974
[Caption omitted in printing]

## COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

The United States of America, by Dean C. Smith, United States Attorney for the Eastern District of Washington, acting under authority of 25 USC §175 and of the Attorney General and at the request of the Secretary of the Interior, complains and alleges as follows:

### JURISDICTION AND CAUSE OF ACTION

1. This Court has jurisdiction by reason of the fact that the United States is plaintiff, 28 USC §1345.

2. The United States brings this action on behalf of the Confederated Bands and Tribes of the Yakima Indian Nation, hereinafter called "The Yakima Indian Nation", and the licensed Indian retailers of the Yakima Indian Nation.

Plaintiff entered into a Treaty with the Yakima Indian Nation on June 9, 1855. This Treaty was ratified on August 8, 1859. Among other things this Treaty established the dependence of the Yakima Indian Nation on plaintiff, the recognition of this nation and that the property of this nation should be free from levy or attachment.

3. This is a civil action seeking declaratory judgment and injunctive relief against wrongful and unlawful actions undertaken and being undertaken, under color of law, by George Kinnear, Director of the State of Washington, Department of Revenue, his agents, officers and employees to deprive, to diminish and to effect diminution and extinguishment of certain constitutional, treaty and legal rights of the Yakima Indian Nation and the licensed Indian retailers of the Yakima Indian Nation, to engage in Indian commerce. Declaratory judgment and injunctive



relief is also sought against said defendant, its agents, officers and employees for their wrongful and unlawful acts and actions to tax and to levy taxes upon, to seize, to alienate, to encumber and to regulate the real and personal properties of the Yakima Indian Nation, or its licensed Indian retailers, and to levy against and to restrict the trade and commerce of the Yakima Indian Nation and its personal properties, or its licensed Indian retailers and their properties, and to deprive the Yakima Indian Nation of its properties, or the licensed Indian retailers of their properties, without due process of law and without lawful authority.

### IDENTIFICATION OF THE PARTIES AND PARTY IN INTEREST

4. Plaintiff is the United States of America.

5. Defendant, State of Washington, was admitted to the United States of America pursuant to Enabling Act of February 22, 1889 and the President's Proclamation of November 11, 1889.

6. Intervenor-Plaintiff is Confederated Bands and Tribes of the Yakima Indian Nation.

7. The Yakima Indian Nation is an Indian tribe or Indian Nation established by Treaty with the United States of America, entitled *"Treaty with the Yakimas"*, 12 Stat. 951. The Yakima Indian Nation and its governing bodies are recognized by the Secretary of Interior. The Yakima Indian Nation has a membership of over 6,000, the majority of which live on the Yakima Indian Reservation which is located within the exterior boundaries of the State of Washington. This reservation was reserved for the Yakima Indian Nation in the *"Treaty with the Yakimas,"* 12 Stat. 951. (That the State of Washington has not assumed jurisdiction over the trust lands on the Yakima Reservation in any manner that would effect the outcome of this action.)

Within the exterior boundaries of the Yakima Indian Reservation, the Yakima Indian Nation, in the exercise of

its governmental powers and in pursuance of a duly enacted tribal ordinance, approved by the Secretary of Interior, does license and tax the sale of cigarettes and other tobacco products. Its licensed Indian retailers and their employees are all members of the Yakima Indian Nation enrolled under 18 USC §601 and their premises are all located on trust or restricted lands within the exterior boundaries of the Yakima Indian Nation. The Yakima Indian Nation also operates a tribal enterprise which regularly purchases cigarettes from a wholesale dealer in Idaho and orders their delivery to a building on trust property on the Yakima Indian Reservation by means of interstate common carrier or transport, that thereafter the Yakima Indian Nation sells and delivers these cigarettes to its member licensed retailers to their places of business, that thereafter these licensed Indian retailers resell these cigarettes at retail. That the Yakima Nation receives $.01 per pack tax and charges $.02 per pack markup on each pack so sold. These revenues are used by the Yakima Nation for general tribal programs.

## CAUSE OF ACTION

8. That on May 5, 1972 defendant, its agents, officers and employees classified the Yakima Indian Nation as a taxpayer and assessed a tax of $304,582.40 against the Yakima Indian Nation together with a penalty of $394,582.40 and interest. That a copy of said attachment is attached hereto and marked Exhibit "A" and made a part of this Amended Complaint.

9. That thereafter on November 30, 1972 the defendant, its agents, officers and employees did issue a warrant for unpaid taxes claiming an indebtedness from the Yakima Indian Nation to the defendant in the amount of $650,333.88. That this warrant levied upon the real and personal property of the Yakima Indian Nation. A copy of said warrant is marked Exhibit "B" attached hereto and made a part hereof.

10. That defendant, its agents, officers and employees



on or about December 19, 1972 issued a Notice and Order to Withhold and Deliver (continuing levy) to Garrett Truck Lines, Inc. and other like common carriers regularly engaged in interstate commerce in the transporting of goods in established interstate highway transport routes that serve the Yakima Indian Reservation. That this notice and order demanded that all said carriers withhold from and deliver to the Washington State Department of Revenue all personal properties of the Yakima Indian Nation. That said notice and order is a continuing levy and provides that if the company should fail or refuse to comply that a judgment for $650,333.88 would be taken against them. That a copy of said notice and order is attached hereto marked Exhibit "C" and made a part hereof.

11. That pursuant to said notice and order Garrett Truck Lines did inform defendant that it had certain goods belonging to the Yakima Indian Nation, and the Department of Revenue seized these goods from regular interstate shipment (i.e. tobacco products) and sold them. That because Garrett Truck Lines and other interstate carriers and defendant have said the same continuing procedures would be followed, the Yakima Indian Nation has been forced to cease doing business in this tribal enterprise. Similarly, the licensed Indian retailers of the Yakima Indian Nation have been forced to cease selling tobacco products.

12. That the defendant has threatened similar actions against the licensed Indian retailers of the Yakima Indian Nation, and the defendant actually has seized tobacco products from individual Indian retailers who are members of other tribes and bands and located within other Indian reservations.

13. That on August 23, 1974 the Washington State Department of Revenue, through an emergency provision, amended its regulations pertaining to the state sales tax. The amendment removes the sales tax exemption that the licensed Indian retailers of the Yakima Indian Nation had enjoyed under the prior state regulation on retail sales

made within the exterior boundaries of the Yakima Indian Reservation. The defendant mailed notices to the individual retailers detailing this change and enclosing forms which must be completed and returned to the defendant within thirty (30) days. Said notices threaten that failure to comply will expose the individual licensed Indian retailers to such enforcement provisions as Washington law prescribes.

14. That the foregoing action of the defendant, its agents, officers and employees is unlawful and improper in the following respects:

a. Defendant's actions are an unconstitutional interference with Indian commerce.

b. Defendant is unlawfully exceeding its jurisdiction.

c. Defendant's actions are an unconstitutional interference with commerce with and upon an Indian Reservation.

d. Defendant's actions are an unlawful interference with plaintiff as Congress has pre-empted the field of regulation of the Commerce in and to Indian Reservations.

e. Defendant's actions are an unlawful interference with the internal affairs of the Yakima Indian Nation and the licensed Indian retailers of the Yakima Indian Nation.

f. Defendant's actions are an unlawful levy and attachment of properties of the Yakima Indian Nation which are free from levy and attachment under treaty and under the express terms under which the State of Washington gained admission to the Union.

g. Defendant's actions are destructive of the commerce of the Yakima Indian Nation and its licensed Indian retailers and fail to provide the Yakima Indian Nation and its licensed Indian retailers with due process of law.



15. The plaintiff, the Yakima Indian Nation, and the licensed Indian retailers of the Yakima Indian Nation do not have an adequate remedy at law because the amount of the assessment grossly exceeds the Yakima Indian Nation's revenue from the handling of cigarettes and it is therefore impossible for the tribe, or individual Indian retailers, to pay the tax and sue for recovery.

16. That an actual controversy exists between the plaintiff on one hand and the defendant on the other as to the nature and extent not only of the Yakima Indian Nation's right, but also of its's licensed Indian retailers' right, to engage in commerce without taxation, levy or attachment.

WHEREFORE, plaintiff prays that this Court after hearing:

a. Declare that the Yakima Indian Nation's activity and the activity of its licensed Indian retailers in trade and commerce, as it involves the purchase of wholesale of cigarettes[*sic*] for delivery to the Yakima Indian Reservation for the Yakima Indian Nation's use including commercial disposition of such commodities through sale of said products by licensed Indian retailers on reservation land to Indian and non-Indian purchasers alike, is an activity protected against any interference, regulation, imposition of taxes or levy, seizure or sale of properties involved or incident thereto by any allegation or exercise of authority by defendant and its agents, officers and employees.

b. Declare that the "Order Assessing Tax and Notice of Assessment" and "Warrant for Unpaid Taxes" issued by defendant against the Yakima Indian Nation constitutes an unlawful levy of taxes.

c. Declare that the several "Notice and Order to Withhold and Deliver (continuing levy)" orders issued by defendant against numerous companies, businesses and corporations regularly engaged and doing business in interstate commerce and transport are

invalid and unenforceable for levying upon, attaching or commanding delivery of the Yakima Indian Nation's personal or other properties to the Department of Revenue of the State of Washington.

d. Declare that the licensed Indian retailers' activity in trade and commerce within the exterior boundaries of the Yakima Indian Reservation through commercial disposition of commodities, goods and services to Indian and non-Indian purchasers is an activity protected against any interference, regulation or imposition of the Washington State sales tax by its agents, officers and employees.

e. Issue preliminary and permanent injunctions against defendant, its agents, officers and employees enjoining them from engaging in any action or acting in any manner to stop, prevent or interfere with Yakima Indian Nation's transactions and business activities, or the transactions and business activities of its licensed Indian retailers in Indian commerce and from acting in any manner to stop, prevent or interfere with the transport or delivery of properties purchased by the Yakima Indian Nation for delivery to the Yakima Indian Reservation and enjoining defendant from acting in any manner to levy taxes upon the properties of the Yakima Indian Nation when transported or moved in commerce, and enjoining defendant from acting in any manner to assess or levy taxes upon the individual licensed Indian retailers upon their sales of tobacco products to Indian or non-Indian purchasers, and enjoining defendant from acting in any manner to seize or to receive into its possession any of the properties of the Yakima Indian Nation, or its licensed Indian retailers, being moved or which may be moved or transported in commerce, or which is sold or may be sold pursuant to tribal ordinance by licensed Indian retailers upon the Yakima Indian Reservation to either Indian or non-Indian purchasers, and enjoining defendant from



acting in any manner to enforce, or give effect to, any assessments, levies, taxation orders, warrants, or claims against the real or personal properties of the Yakima Indian Nation heretofore issued by defendant or which may be hereafter issued to restrict, prevent or interfere with Yakima Indian Nation's transactions or business in securing delivery of commodities in Indian commerce and enjoining defendant from imposing any sales tax upon the commercial disposition within the Yakima Indian Reservation of goods, commodities or services by the licensed Indian retailers of the Yakima Indian Nation to either Indian or non-Indian purchasers.

f. For such other and further relief as the Court deems just and equitable.

/s/_____

DEAN C. SMITH
United States Attorney

851 U.S. Court House
P.O. Box 1494
Spokane, Wa. 99210

Telephone: 509-456-3811

* * * *

[Exhibit A (Tax Assessment) omitted in printing]

[Exhibit B (Tax Warrant) omitted in printing]

[Exhibit C (Notice and Order to Withhold and Deliver) omitted in printing]

## [EXHIBIT D TO AMENDED COMPLAINT]

**EXCERPT FROM UNITED STATES CODE, TITLE 15 — COMMERCE AND TRADE**

**SEC. 1673. RESTRICTION ON GARNISHMENT — MAXIMUM ALLOWABLE GARNISHMENT**

"Exceptions

(b) The restrictions of subsection (a) of this section do not apply in the case of

(1) any order of any court for the support of any person.

(2) any order of any court of bankruptcy under chapter XIII of the Bankruptcy Act.

(3) any debt due for any State or Federal tax."

**EXCERPT FROM REVISED CODE, 82.32.235:**

"Any person, or any political subdivision or department upon whom service has been made is hereby required to answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired of in the notice.

"In the event there is in possession of any such person or political subdivision or department, any property which may be subject to the claim of the department of revenue, such property shall be delivered forthwith to the department or its duly authorized representative upon demand to be held in trust by the department for application on the indebtedness involved or for return, without interest, in accordance with final determination of liability or nonliability, or in the alternative, there shall be furnished a good and sufficient bond satisfactory to the department of revenue conditional upon final determination of liability.

"Should any person or political subdivision fail to make answer to an order to withhold and deliver within the time prescribed herein, it shall be lawful for the court, after the time to answer such order has expired, to render judgment by default against such person or political subdivision for the full amount claimed by the department of revenue in the notice to withhold and deliver, together with costs."



**EXCERPT FROM DEPARTMENT OF REVENUE RULE 217:**

"WITHHOLD AND DELIVER

"The Department of Revenue is authorized to issue to any person, or to any political subdivision or department of the state, a notice and order to withhold and deliver property of any kind whatsoever when there is reason to believe that there is in the possession of such person, political subdivision or department, property which is *or shall become* due, owing or belonging to any taxpayer against whom a warrant has been filed. *The notice and order to withhold and deliver shall constitute a continuing levy on such property until the department shall issue its release of such levy.*

"The notice and order to withhold and deliver may be served by the sheriff of the county wherein service is made, or by his deputy, or by any authorized representative of the Department of Revenue. Persons upon whom service has been made are required to answer the notice within twenty days exclusive of the day of service. The answer must be under oath and in writing. *If such answer states that it cannot be presently ascertained whether, in fact, any property is or shall become due, owing or belonging to such taxpayer, the persons served herein are required to further answer when such fact can be ascertained with reasonable certainty.*"

## SUPPLEMENTAL PRE-TRIAL ORDER

Filed February 28, 1977
[Caption Omitted in Printing]

As a result of several pre-trial conferences held in the above-entitled cause before the three judge panel convened under 28 U.S.C. §2281, this supplemental pre-trial order has been formulated and settled as follows:

### 1. NATURE OF PROCEEDINGS

1.1 **Jurisdiction of the Court.** This court has jurisdiction of this cause pursuant to 28 U.S.C. §1345 because the United States is plaintiff. In addition, this court has jurisdiction of this cause pursuant to 28 U.S.C. §1362 because the Intervenor-plaintiff, the Confederated Tribes and Bands of the Yakima Indian Nation (hereinafter "Tribe"), is an Indian tribe with a governing body duly recognized by the Secretary of the Interior, and the matter in controversy arises under the constitution, laws, and treaties of the United States. Jurisdiction of this court is not defeated with respect to plaintiff and intervenor-plaintiff by 28 U.S.C. §1341.

1.2 **Three Judge Court.** A three judge court was convened pursuant to 28 U.S.C. §2281 on June 18, 1973, on the grounds that plaintiff's complaint sought to enjoin the enforcement of state statutes alleged to be in violation of the Commerce Clause, Art. I, Sec. 8, Cl. 3, of the United States Constitution.

1.3 **Nature of the Case.** This is a civil action seeking declaratory and injunctive relief against the enforcement of Washington state laws dealing with cigarette, tobacco products, and sales taxes on sales by the Tribe and by licensed Indian retailers of the Tribe to persons who are not members of the Tribe at locations within the exterior boundaries of the Yakima Indian Reservation. The action was originally brought by the United States on behalf of the Tribe and the licensed



Indian retailers of the Tribe. The Tribe, with the agreement of counsel for the United States and the State of Washington (hereafter "State"), intervened on its own behalf as a plaintiff.

2. **RELIEF SOUGHT BY PLAINTIFF.** Plaintiff United States seeks declaratory and injunctive relief:

2.1 **Taxes on Products Shipped to Tribe for Resale to Non-Members.** Against the imposition of state cigarette, tobacco products, and sales taxes on products being shipped from outside the State to trust land on the Yakima Indian Reservation consigned to the Tribe where such products are eventually resold to licensed Indian retailers who then sell such products on trust land within the Yakima Indian Reservation to persons other than members of the Tribe.

2.2 **Threatened Seizure of Shipments to Tribe.** Against the State, its agents, officers and employees for their allegedly wrongful and unlawful acts in threatening to seize as contraband cigarettes and tobacco products upon which state taxes have not been paid being shipped from outside the State to the Tribe intended for resale to licensed Indian retailers on trust property within the Yakima Indian Reservation for eventual resale to persons who are not members of the Tribe.

2.3 **Threatened Seizure of Products of Retailers.** Against the State, its officers, agents and employees in threatening and attempting to levy upon and seize real and personal properties of licensed Indian retailers of the Tribe to satisfy cigarette, tobacco products, and sales taxes assessed against such licensed Indian retailers.

2.4 **Sales Tax on Sales to Non-Members of Tribe.** Against the State, its officers, agents and employees for their allegedly unlawful actions in attempting to enforce the state sales tax upon sales of tangible

personal property and taxable services within the exterior boundaries of the Yakima Indian Reservation by the Tribe and by licensed Indian retailers of the Tribe to non-members of the Tribe.

2.5 Declaratory and injunctive relief, against the state, its agents, officers and employees for entering upon trust properties within the exterior boundaries of the Yakima Reservation without the permission of the Tribe for the purpose of enforcing its tax statutes.

2.6 Declaring that so much of Rule 192 that requires the keeping of records by the Tribe and its licensed retailers on each and every sale is void.

3. **RELIEF SOUGHT BY INTERVENOR-PLAINTIFF.** The Tribe seeks the same relief sought by the United States, and to declare certain state statutes, rules and regulations void. In addition, the Tribe seeks damages against the State of Washington:

3.1 **Wrongful Regulation, Taxation and Seizure.** For allegedly wrongful and unlawful actions taken by the State and its agents and employees to regulate, levy taxes upon and encumber, seize and alienate the real and personal properties of the Tribe.

3.2 **Restriction of Commerce and Deprivation of Property.** For actions undertaken by the State and its agents and employees to levy taxes upon and restrict the trade and commerce of the Tribe, and to deprive the Tribe of its property without due process of law.

3.3 The Tribe seeks to have RCW Chapter 82.08, 82.12, 82.24, and 82.26 and WAC 458-12-192 as it affects sales by Indians on the Yakima Indian Reservation declared void.

4. **RELIEF SOUGHT BY DEFENDANT.** The State seeks declaratory relief against the United States in its representative capacity and the Tribe, declaring:



4.1 **Require Tribe to Collect.** That the State may require the Tribe and/or its licensed Indian retailers to collect and remit cigarette, tobacco products, and sales taxes imposed upon non-members of the Tribe with respect to purchases at retail from the Tribe and/or its licensed Indian retailers at locations within the exterior boundaries of the State, including the Yakima Indian Reservation.

4.2 **State Statutes Applicable.** Declaring that Washington state statutes pertaining to taxation of cigarettes (Ch. 82.24 RCW), tobacco products (Ch. 82.26 RCW), and retail sales (Ch. 82.08 RCW) and use tax (Ch. 82.12 RCW) are applicable to the Tribe and licensed retailers of the Tribe as administered by the State in conformity with WAC 458-12-192, as adopted on November 12, 1976.

5. **ADMITTED FACTS.** The parties, by counsel, stipulate and agree that the facts set forth herein are true and correct, and that the several documents attached as exhibits hereto are true, accurate and conformed copies of the originals thereof and may be received herein without further authentication. The parties further stipulate that the facts within this section are material and relevant to the Court's determination in this cause.

5.1 **United States.** The United States is a sovereign nation.

5.2 **Tribe.** The Tribe is a sovereign Indian Nation and Tribe established by treaty with the United States (12 Stat. 951) with a governing body duly recognized by the Secretary of the Interior of the United States of America.

5.3 **State.** The State is a sovereign state of the United States. Its tax laws pertaining to cigarettes, tobacco products, and sales of tangible personal property and services are administered by an agency of the State, the Department of Revenue.

5.4 **Reservation.** The Tribe has a membership of over 6,000, the majority of which live on the Yakima Indian Reservation. This reservation was reserved for the Tribe pursuant to the Treaty with the Yakimas, 12 Stat. 951, and is entirely located within the exterior boundaries of the State. The reservation has approximately 1,387,505 acres within its exterior boundaries, of which all but approximately 270,895 are held in trust or restricted status by the United States as trustee for the Tribe, its members or other Indians. These 270,895 acres are owned in fee simple primarily by non-Indians.

5.5 **Tribal Population.** The total population on the Yakima Indian Reservation is approximately 27,000. Approximately 5,000 members of the Tribe live on the reservation. Indians of other tribes and bands numbering approximately 1,500, together with members of the Yakima Tribe make up about 25 percent of the population residing on the Yakima Reservation.

5.6 **Tribal Ordinance and Tax.** The Tribe, on October 8, 1970, January 30, 1974, and on September 11, 1974, enacted tobacco ordinances, copies of which are appended hereto as Exhibits A-1-2-3. Pursuant to these ordinances, the Tribe operates a tribal enterprise, wholesaling cigarettes and tobacco products to licensed retailers of the Tribe for resale at retail to members and non-members of the tribe at locations on the Yakima Indian Reservation. The Tribe imposes a tax and obtains a return on each pack of cigarettes sold at retail by these licensed dealers. The foregoing ordinances have been approved by the Secretary of the Interior.

5.7 **Conduct of Tribal Cigarette Business and Taxation.** The tribal enterprise, licensing, and taxation scheme with respect to cigarettes and tobacco products is conducted as follows: cigarettes and tobacco products are purchased by the Tribe from out-of-state wholesalers and shipped directly to the Tribe by licensed, bonded interstate common carriers. Physical possession of



these products are taken at the tobacco warehouse of the Tribe in the Yakima Indian Nation Industrial Park, Wapato, Washington, which is within the exterior boundaries of the Yakima Indian Reservation. These products are in turn resold and delivered to the individually owned smoke shops by tribal owned vehicles. These products are then resold at retail to members and non-members of the Tribe. No records are kept with respect to the numbers of cartons of cigarettes or the value of tobacco products purchased by non-members of the Tribe, nor do the licensed retailers at any time limit sales of cigarettes to two cartons per sale to each non-member of the Tribe.

All persons licensed by the Tribe to sell cigarettes and tobacco products at retail within the exterior boundaries of the Yakima Indian Reservation are enrolled members of the Tribe. The land upon which these licensed Indian retailers conduct their retail business is allotted land held in trust by the United States for individual Indians or by restricted deed to individual Indians. The following licensed Indian tobacco product retail establishments are presently operating on the Yakima Indian Reservation:

Judy Hovis & Winona Brown
Little Brown Smoke Shack
16th Avenue
Yakima WA 98665

Harvey Lincoln Davis
Goodman Road Smoke Shop
Goodman Road
Yakima WA 98665

Kay E. Hieronimus
Triangle Smoke Shop #2
Main Street
Parker WA 98939

Arlene Watlamett Marfori
Tuffy's Smoke Shop
P. O. Box 293
Parker WA 98939

Willie Hert
Bow & Arrow Smoke Shop
Rt. 2, Box 2000
Wapato WA 98951

Robert Edward Ramsey
Little Beaver Smoke Shop
Fort Road
Toppenish WA 98948

Holt Brewer
Lower Valley Smoke Shop
Highway 3-A
Mabton WA 98935

Louise Berford Andrews
Kulchiat's Gift & Smoke Shop
West Wapato Road
Wapata WA 98951

Elmer Olney
Elmer's Trading Post
Second Street
White Swan WA 98952

Robert Ramsey
Little Beaver Smoke Shop
16th Avenue
Yakima WA 98665

Janet George
Little Smoke Shop

Dora Mesplie
Dora's Smoke Shop
Toppenish WA 98948



Elmer & Ellen Swan Olney
Reservation Smoke Shop
Highway 97
Wapato WA 98948

Gladys Herrara
Gladys' Smoke Shop
Fort Road
Toppenish WA 98948

Samuel E. Hale
Triangle Smoke Shop
Highway 22 & Larue Road
Toppenish WA 98948

William H. Hoptowit
Mabton Smoke Shop
Washington & 1st
Mabton WA 98935

Genevieve Hooper
Honey Bear Smoke Shop
Donald Street
Wapato WA 98951

5.8 **Conduct of Other Tribal Business and Taxation.** The Tribe also operates on its own behalf several other tribal enterprises. With the exception of an Aircraft Sales, Charter and Service Enterprise, which it operates as a corporation off the Yakima Indian Reservation and pays applicable state taxes regarding its operation, these tribal enterprises are all operated by the Tribe on the Yakima Indian Reservation and are wholly owned by the Tribe. The income from these enterprises is used to operate these enterprises and any surplus is used for tribal purposes. These enterprises provide on-reservation employment for tribal members and other Indians and non-Indians. The majority of those working in these tribal enterprises are tribal members. These enterprises are operated by the Tribe to develop its reservation, to provide employment for its members, and

to make a profit. In addition to the Tobacco Enterprise more fully discussed above and the Aircraft Sales and Service Enterprise mentioned in this paragraph, the Tribal enterprises are: a Land Enterprise, Timber Enterprise, Furniture Manufacturing Enterprise, Boat and Housing Unit Component Manufacturing Enterprise, Indian Arts and Crafts Sales Enterprise, Fish and Food Processing Enterprise, and a Newspaper Enterprise. The sales of these enterprises will exceed $12,000,000 annually.

At this time the State of Washington does not claim the authority to regulate or tax the present sales of the Timber or Land Enterprises regardless of whether the sales are to members or non-members. The State does claim the right and power to regulate and tax the retail sales of services and personal property of the other enterprises to non-members of the Yakima Tribe on and off the Yakima Indian Reservation. The total value of these sales, in addition to cigarette sales, will exceed $2,000,000. These sales are at economic value and if State excise taxes are paid on these sales it will reduce the income of the Yakima Tribe from these sales. No approximation of the percentage of sales to those not members of the Yakima Tribe is available, but the amount is substantial. The present state sales tax amounts to 5.1 percent of the retail sales price.

5.9 **Financing and Location of Businesses.** The tribal cigarette and tobacco products business is financed entirely by the Tribe and the retail cigarette and tobacco products businesses are financed entirely by licensed Indian retailers. Some of the retailers obtain their financing from the tribal loan program. The retailers' places of business are accessible by public roads and highways and are located in areas of the reservation open to the general public.

5.10 **Purchase by Non-Members of Tribe.** A majority of the cigarettes and tobacco products sold by the licensed Indian retailers are purchased by persons who



are not members of the Tribe. No precise figures are available to measure the exact percentage of cigarettes and tobacco products purchased by the members of the Tribe.

5.11 **Tribal Revenue From Sale of Tobacco.** The Tribe imposes a tax of 22.5 cents per carton on each carton sold by its licensed retailers. In addition, the tribe obtains revenue by a "markup" of 1 cent per carton sold to licensed Indian retailers. During 1975, the total revenue to the tribe from its tax and wholesaling enterprise was $278,408.24. The retailer realizes a gross profit of 65 cents per carton.

5.12 **Expenditure of Tribal Funds.** The funds received by the Tribe from its cigarette, tobacco products, and sales tax, plus profits from its cigarette and tobacco products wholesaling enterprise are available for expenditure by the Tribe in support of its governmental functions.

Some of the governmental programs are joint federal-tribal programs expending both federal and tribal funds. Among the governmental functions provided for the residents of the Yakima Indian Reservation by the expenditure of tribal monies including the funds available from the aforementioned tribal tax and enterprises are the following:

1. **General Council Expense.** The Yakima Tribe holds at least one annual meeting at which all adult members of the Tribe attend for the purpose of determining general policy and electing Tribal Council members. There are three officers of the General Council who attend Tribal Council Meetings and otherwise are engaged in the activities of the government of the Yakima Nation and the Yakima Indian Reservation. The amount of tribal funds expended in fiscal year 1976 was the amount of $36,525.00 for this governmental function.

2. **Tribal Council Expense.** On a day to day basis, all of the executive and legislative functions governing the Yakima Indian Nation and the Yakima

Indian Reservation are performed by a 14 member Tribal Council. This Tribal Council promulgates all laws, ordinances, and resolutions regarding the operation of the Yakima Indian Nation and the Yakima Indian Reservation and exercises supervisory and executive control over all programs of the Yakima Indian Nation. The Tribal Council is responsible for the expenditure of Tribal funds for governmental and proprietary functions in an amount that will exceed ten million dollars. During fiscal year 1976, tribal funds in the amount of $469,123.00 were expended for this governmental purpose. During fiscal year 1976 the Tribal Council supervised the expenditure of $11,992,039 for governmental and tribal programs.

3. **Tribal Health Sanitation Program.** This program provides for the maintenance of sanitation facilities upon the Yakima Indian Reservation and for construction of sanitation facilities. During fiscal year 1976, $95,000 of tribal funds was expended in maintenance and $80,890 was expended for construction of sanitation facilities to perform this governmental function.

4. **Alcoholic Program.** This program provides outreach counseling, a receiving and recovery detox center, community education and a halfway house for the assistance of alcoholics. During fiscal year 1976, the amount of tribal funds spent for this governmental purpose was $19,541.

5. **Program for Aged.** This program is to secure and maintain maximum independence and dignity in home environment to remove individual and social barriers to economic and personal independence and to provide nutritional services for older people living without the reservation. During fiscal year 1976, $40,985 of tribal funds was spent for this governmental purpose.

6. **Education and Scholarship Program.** This fund provides for gratuitous scholarship grants to assist qualified and deserving members of the Yakima Tribe in their pursuit of higher education, provide staff to run such



a program and provide student counseling and liaison services with institutions of higher education. During fiscal year 1976, $145,155 of tribal funds was spent for this governmental purpose.

7. **Johnson-O'Malley Consortium Region IV Program.** This program is to help provide familiarity with the Yakima language and the Yakima culture and to work closely with school districts in Region IV to provide such technical services as may be possible to assist the education of Indian children in the public schools. During fiscal year 1976, $8,855 of tribal funds was spent for this governmental purpose.

8. **Head Start and Kindergarten Support Projects.** This program provides a comprehensive early childhood education program with performance standards, education, social services, health, nutrition, mental health, parent involvement and cultural development for pre-school children on the Yakima Reservation. During fiscal year 1976, $162,593 of tribal funds were spent for this governmental purpose.

9. **Camp Chaparral Education Activities.** This program provides for maintenance and protection of a tribal camp in the woods where live-in educational facilities are provided under federal programs for remedial education for some 200 students during the summer months. During fiscal year 1976, $749.00 was expended for this governmental purpose.

10. **Project Palatisha-Handicapped Children.** The major purpose of this year around program is to provide special education services to pre-school children who have special needs or who are handicapped. During fiscal year 1976, $23,047 was expended on this governmental purpose.

11. **Early Childhood Education Programs.** Project SECEP provides comprehensive support services to the Yakima Indian Nation early childhood education

programs. These services include equipment, books for children, staff, parents, raw materials for staff use, making curriculum material, supplies, in service, teacher training programs, workshops and technical assistance to requesting Indians to support early childhood education programs. In fiscal year 1976, $4,447 was spent for this governmental purpose.

12. **Law Enforcement-Police Department.** For salaries and expenses to provide 22 positions: 10 tribal policemen, 1 criminal investigator, 4 dispatcher-jailers, 1 cook, 1 police matron, 1 juvenile officer and police matron, 1 custodian, 1 police clerk, 1 administrative technician, and 1 secretary to provide law enforcement officers and support personnel to provide law and order services on the Yakima Reservation. During fiscal year 1976, the amount of tribal funds expended was $285,591 for these governmental services.

13. **Tribal Game Department.** This Department has a dual responsibility of enforcement of federal and tribal game laws over the entire reservation encompassing areas of four different counties within the State of Washington and in addition, the Tribal Treaty Rights upon the Columbia River. The Department conducts all emergency search and rescue operations in the field in mountain areas of the reservation. It maintains a scuba diving team, snowmobiles, boats, all-terrain vehicles and 4-wheel drive units. During fiscal year 1976, $85,384 of tribal funds were expended for this governmental purpose.

14. **Tribal Judiciary.** Salaries, employment benefits, and equipment are needed to operate the Yakima Tribal Court consisting of the Chief Judge, three associate Judges and one Court Clerk. During fiscal year 1976, the amount of tribal funds expended for this governmental purpose was $35,958.

15. **Yakima Nation Public Defender Program.** This project provides criminal legal defense for Yakima Reservation based Native Americans. During



fiscal year 1976, $11,762 of tribal funds were spent on this governmental program.

16. **Overall Economic Development Program Feasibility Studies.** This program provides feasibility studies to determine potential for developing tribal enterprises within the Yakima Indian Reservation. During fiscal year 1976 $25,838 of tribal funds was spent for this governmental purpose.

17. **Public Relations-Media Services.** The purpose of this department is to provide public information regarding activities upon the Yakima Indian Reservation. During fiscal year 1976, $40,389 of tribal funds were expended on this governmental program.

18. **Planning Department.** The Planning Department compiles an overall comprehensive plan for the overall development of the Yakima Indian Reservation. During fiscal year 1976, $26,890 of tribal funds were spent on this governmental program.

19. **Temporary Employment Program.** To help relieve the unemployment on the Yakima Reservation, during fiscal year 1976, $29,165 of tribal funds were expended on this governmental program.

20. **Maintenance of Tribal Buildings.** Expenditure of funds to maintain, improve and operate tribal community buildings and governmental facilities for the year 1976 required the expenditure of $172,337 of tribal funds for this governmental purpose.

21. **Operation of Water and Sewer Project Within the Community of White Swan.** During fiscal year 1976, $40,191 of tribal funds were expended for this governmental purpose.

22. **Streambank Stabilization.** This program provides funds for the stabilization of the streambank on the Yakima River. During fiscal year 1976, $1,191 of tribal funds was expended for this governmental purpose.

23. **Roads Program.** To maintain and improve access roads not on the BIA or state road system and parking areas for Indian cemeteries. During fiscal year 1976, $41,500 of tribal funds were expended for this governmental purpose.

24. **Zoning Administration.** To administer tribal zoning code covering entire Yakima Indian Reservation. During fiscal year 1976, $24,956 were expended for this governmental purpose.

25. **Housing Development.** To assist in providing adequate housing on the Yakima Indian Reservation. During fiscal year 1976, $14,533 of tribal funds were expended for this governmental purpose.

In addition to the foregoing governmental services, the Yakima Nation as a government and as a proprietary function expense, expended during fiscal year 1976, the total amount of $11,996,039 for the maintenance of tribal programs.

5.13 **State Cigarette Tax.** The State cigarette excise tax amounts to $1.60 per carton of cigarettes and the State general sales tax amounts to 24 cents per carton based on the average selling price of a carton of cigarettes for a total of $5.00 per carton of cigarettes sold at retail within the state.

5.14 **Retail Price of Cigarettes.** The retail prices of cigarettes sold by licensed retailers of the Tribe are $3.95 per carton, as compared to average retail prices of $5.00 per carton in state licensed retail stores, on which the state cigarette and sales tax has been paid.

5.15 **Seizures of Unstamped Cigarettes.** Prior to the instigation of this litigation the State, under color of law, seized unstamped cigarette and tobacco products shipments which were consigned to the Tribe. These shipments originated outside of the State and were seized from common carriers while en route to the Yakima Indian Reservation and while in interstate commerce. In addition, the State has seized cigarettes and tobacco products on numerous occasions from Indian retailers of other Indian tribes and bands within the state and has threatened similar action against the licensed Indian retailers of the Yakima Tribe. In the event unstamped cigarettes and tobacco products continue to be sold by licensed Indian retailers of the Tribe to non-members of the Tribe without the affixing of tax stamps and collection of sales tax, the State will seize unstamped cigarettes and tobacco products in the possession of licensed Yakima Indian retailers intended for sale to non-members of the Tribe.



5.16 **Two Carton Exemption.** On February 19, 1972, effective February 27, 1972, the legislature enacted Laws of 1972, 1st ex. sess., chapter 157. Sections 6 and 7 of that enactment, as construed by the Washington State Supreme Court in *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744 (1974) permitted the Tribe to possess unstamped cigarettes for resale to its tribally licensed retailers, and permitted these tribally licensed retailers to retail no more than two cartons of cigarettes to non-Indians without affixing cigarette excise tax stamps and collection of the cigarette excise tax. Nothing in that statute purported to relieve licensed Yakima Indian retailers of any obligation to collect the state retail sales tax on sales of cigarettes to non-Indians, although at that time, the State, through its regulations, did not require such licensed retailers to collect and remit the state sales tax.

5.17 **Removal of Exemption and Registration.** On August 23, 1974, the State, through an emergency provision, amended its regulations pertaining to the state sales tax. The amendment removed the exemption from sales tax collection responsibility on sales to non-Indians that the licensed Indian retailers of the Tribe had been permitted under the prior state regulation on retail sales made within the exterior boundaries of the Yakima Indian Reservation. The State mailed notices to

the individual Indian retailers detailing this change and enclosing forms which were required to be completed and returned to the state within thirty (30) days. Said notices threatened that failure to comply with the registration and reporting requirements on retail sales would expose the individual licensed Indian retailers to such enforcement provisions as Washington law prescribed. No registration forms were returned to the state, nor has any licensed retailer of the Tribe collected and remitted sales tax as required pursuant to state regulation.

5.18 **Removal of Two Carton Exemption.** On May 6, 1975, the Washington State Legislature amended section 7, chapter 157, Laws of 1972, 1st ex. sess., which removed the "two carton exemption" for cigarette excise tax liability and collection responsibility. Pursuant to this statute, the Tribe acquires no cigarette excise tax liability and may possess unstamped cigarettes for resale to its tribal members. However, the statute requires licensed Indian retailers of the Tribe to collect cigarette excise taxes with respect to sales to non-members of the Tribe and remit the tax to the State.

5.19 **Rule 192.** On November 12, 1976, effective December 12, 1976, the State amended its regulations pertaining to state cigarette and sales taxes on sales by licensed Indian retailers of the Tribe to non-members of the Tribe. A copy of that regulation is attached hereto as Exhibit B. That regulation (WAC 458-12-192), among other things, requires licensed retailers of the Tribe to collect and remit state sales and cigarette taxes on sales of cigarettes to non-members of the Tribe.

5.20 **ETB 504.** On November 24, 1976, the State issued its Excise Tax Bulletin No. 504.08.192, outlining procedures to implement WAC 458-12-192 and to provide additional explanation of certain provisions of that administrative rule. A copy of ETB 504.08.192 is attached as Exhibit C. Pursuant to this ETB, licensed



retailers of the Tribe are required to register with the State (without payment of registration fee) and to keep certain records documenting the tax exempt status of sales to members of the Tribe. The following records are required to be kept by all retailers, including licensed retailers of the Tribe.

(a) Name of the Indian purchaser,

(b) The tribal affiliation of the purchaser,

(c) The Indian reservation to which or within which delivery was made, or within which retail services were rendered;

(d) The dollar amount of the sale, and

(e) The date of the sale.

5.21 **Cigarette Tax Not Within Measure of Sales Tax.** ETB 504.08.192, also explains to retailers how to compute the state sales tax on sales of cigarettes by or to Indians. As explained in the ETB, the cigarette excise tax is not to be included within the measure of the sales tax on sales of cigarettes and tobacco products by a licensed Indian retailer of the Tribe to a non-member of the Tribe.

5.22 **Computation of Different Prices.** The aggregate of taxes, both tribal and state, imposed upon the sale of cigarettes by licensed retailers of the Tribe amounts to $2.065 per carton. Assuming that current average gross profit margins remain constant, and that cigarette and sales taxes are in fact collected and remitted to the tribe and the state, the average selling price of a carton of cigarettes sold by a licensed Indian retailer of the Tribe to a non-member of the Tribe will be $5.79 per carton; the average selling price of a carton of cigarettes sold by a licensed retailer of the Tribe to a member of the Tribe will be $3.95 per carton; the average selling price of a carton of cigarettes sold by a non-Indian retailer to a member of the Tribe will be $4.76 per carton; and the average selling price of a carton of cigarettes sold by a non-Indian retailer to a non-member of the Tribe will be

$5.00 per carton. These differences in price are due almost entirely to differences in tax liability.

5.23 **Stamp Requirement.** Licensed Indian retailers of the Tribe may possess unstamped cigarettes for purposes of resale to members of the Tribe. However, state law purports to provide at the time of sale of cigarettes and tobacco products to a non-member of the Tribe, the licensed retailers must affix state cigarette tax stamps on each package of cigarettes and collect and remit to the State the cigarette and tobacco products excise taxes imposed on the purchaser. State law purports to provide the licensed retailers of the Tribe may fulfill this stamping responsibility either by (1) purchasing pre-stamped cigarettes and tobacco products from a wholesaler licensed by the State to affix Washington tax stamps; or (2) purchasing a supply of stamps from the State, in which case the purchase price may be deferred for a period of 30 days upon the posting of a bond in the amount of the purchase price or $2,500 whichever is greater. In the event the licensed Indian retailer affixes stamps himself, he will be entitled to compensation at the rate of $1.85 per thousand packs of cigarettes.

5.24 **Refusal of Tribe.** The Tribe and the licensed retailers of the Tribe have never sought the authorization of the State to acquire and possess unstamped cigarettes and tobacco products and they have never requested to be licensed by the State for purposes of sales of cigarettes and tobacco products. The licensed Indian retailers of the Tribe have failed and will continue to fail and refuse to affix stamps, or otherwise collect and remit any state cigarette and tobacco products excise taxes and sales taxes on sales to non-members of the Tribe purchasing at retail from such licensed Indian retailers. The Tribe and its members who make retail sales of property and services to non-members of the Tribe within the exterior boundaries of the Yakima Indian Reservation have also failed and will continue to fail or refuse to collect and remit state sales taxes on sales to non-members of the Tribe.



5.25 **Temporary Restraining Order.** As a result of seizures of unstamped cigarettes bound for the Yakima Indian Reservation, the Tribe ceased its tribal wholesaling enterprise in January 1973, for a period of ten months, until the issuance of a temporary restraining order in this cause on November 5, 1973, restraining the State from interfering in the conduct of the tribal cigarette enterprise. Losses to the Tribe, in terms of lost profits and lost tax revenues during this period of time amounted to $150,000, computed as follows:

During 1972, according to figures of the State, the tribal enterprise sold to its licensed retail dealers the following cartons of cigarettes and collected its tax and overhead on said sales:

1-72: 84,498. 2-72: 115,306. 3-72: 115,579. 4-72: 105,334. 5-72: 169,908. 6-72: 148,276. 7-72: 120,556. 8-72: 160,489. 9-72: 140,545. 10-72: 154,053. 11-72: 118,028. 12-72: 87,712.

There is no reason to believe that sales in like amounts would not have continued through 1973. Subtracting handling costs, this would bring a tribal loss from the sales of all these cigarettes to approximately $15,000 per month for a ten-month period.

5.26 **No Tax on Tribe.** The civil action sought in the original complaint of the United States was dealt with in *Tonasket v. State*, and until that decision is changed or the statutes on which it is predicated are changed in this particular, the State asserts no liability against the Tribe for cigarette taxes imposed by Ch. 82.24 RCW.

5.27 **No Tax on Tribal Members.** The State does not contest the right of the Tribe or its licensed retailers to make sales of cigarettes, tobacco products, tangible personal property and services at retail to members of the Tribe within the exterior boundaries of the Yakima Indian Reservation for said members own use and consumption without payment of state excise taxes.

6. **FACTS NOT NECESSARILY MATERIAL.** The parties, by counsel, stipulate and agree that the following facts are true and correct and may be considered by the Court as established facts without necessity for further proof, dependent only upon the Court's determination as to materiality or relevancy of these facts in making its determination in this cause. The parties do not, however, waive any objections with respect to such materiality or relevancy.

6.1 **Federal Tax.** The Federal cigarette tax has been paid on all cigarettes purchased by the Tribe and sold at retail by its licensed retailers.

6.2 **BIA.** The Superintendent of the Yakima Indian Agency of the BIA has been delegated the responsibility to license traders with Indians within the exterior boundaries of the Yakima Indian Reservation under the Indian Traders Act (25 U.S.C. §§261-264) and regulations thereunder adopted by the BIA (25 CFR §251, *et seq.*).

6.3 **No Licensed Traders.** No persons trading with the Indians on the Yakima Indian Reservation are licensed under the Indian Traders Act.

6.4 **Voluntary Payment of Certain State Taxes.** A substantial majority of the employees of the Tribe are purportedly under the jurisdiction of the State for unemployment and workman's compensation purposes and the Tribe voluntarily pays the employer's taxes and withholds and pays the employee's taxes imposed by Washington law.

7. **CONTENTIONS OF PLAINTIFF UNITED STATES.**

7.1 This case is within the jurisdiction of a three-judge Court under 28 U.S.C.A. §2281 because of the challenge to the state taxing statutes under the commerce clause of the Constitution.

7.2 The commerce clause of the Constitution of



the United States grants to Congress the exclusive power to regulate commerce with Indians.

7.3 The states, therefore, may regulate Indian commerce only with the express authority of Congress.

7.4 State taxation of retail sales of cigarettes and personal property by Indians on their reservation constitutes a regulation of commerce.

7.5 Congress has not granted to the states power to tax or regulate Indian commerce on their reservations.

7.6 Congress has authorized the Secretary of the Interior to regulate commerce by Indians to approve regulation and taxation of business by Indian tribal governments on their reservations.

7.7 The Secretary of the Interior has approved tribal ordinances of the Yakima Indian Nation regulating and taxing retail sales of cigarettes and other personal property by the Tribe and tribal members to both Indians and non-Indians on their reservation.

7.8 Such approval by the Secretary of Interior constitutes a preemption by the federal government of the regulation and taxing of cigarettes and retail sales on the Yakima Indian Reservation.

7.9 The revenues from the taxing ordinances of the Yakima Indian Nation on cigarettes and retail sales is a significant and important source of income for the conduct of tribal government programs.

7.10 The attempt by the State of Washington to tax cigarette sales by the Tribe or Indian retailers to other Indians or non-Indians competes, conflicts and interferes with regulation of Indian commerce on the Yakima Indian Reservation in an area already preempted by the United States in violation of the commerce clause and the supremacy clause of the Constitution.

7.11 Such conflict with federal action exists whether taxes are levied directly upon the Tribe or Indian retailers or by means of requiring them to collect taxes

from non-Indians and remit them to the State.

7.12 The seizure of unstamped cigarettes being transported to the Yakima Indian Reservation in commerce by the State of Washington to enforce collection of cigarette taxes on sales by licensed Indian retailers to non-Indians is a violation of the commerce clause and the supremacy clause of the Constitution.

7.13 Even were the court to find that the State of Washington has the power to impose upon the tribe and tribal retailers the obligation to collect and remit cigarette and sales taxes on sales to non-Indians the State could nevertheless not impose such obligation with respect to sales to any Indians including Indians who are not members of the Yakima Indian Nation on the reservation.

**8. CONTENTIONS OF INTERVENOR-PLAINTIFF YAKIMA INDIAN NATION.**

8.1 In interpreting treaties and laws involving the Tribe and its members, said treaties and laws are to be resolved in favor of the Tribe and its members.

8.2 The State of Washington's tax laws, rules and regulations, in as much as they deal with Indian Commerce within the Yakima Reservation, are totally within the sphere, which under the Treaty with the Yakimas, relevant statutes and Tribal Resolutions, is reserved for the Federal Government, the Tribe and its members.

8.3 Absent governing Acts of Congress, the State of Washington does not have the power to infringe on the right of the Tribe and its members to make their own laws and to be ruled by them.

8.4 Absent governing Acts of Congress, the Tribe has exclusive sovereignty, under general federal supervision, which precludes the extension of state law (including state tax law and regulations) to Indians on the Yakima Reservation.

8.5 It is federal policy to strengthen tribal self-government and the State of Washington's rules,



regulations, and laws providing that the Tribe and its licensed member retailers be registered, regulated and collect taxes on any portion of its or their sales, is contrary to said federal policy and is an interference with tribal self-government.

8.6 The Washington Enabling Act and Constitution expressly disclaims state jurisdiction or state taxing authority on the Yakima Indian Reservation and the extension of Washington State tax laws or regulations to Indian commerce on the Yakima Reservation without repeal of the disclaimer provision in the State Constitution or permission of the United States would not provide constitutional due process of law to the Tribe and its members and is forbidden by Federal law. That Chapters 82.08, 82.12, 82.24, 82.26 and WAC 458-12-192 exceed constitutional or statutory authority.

8.7 Absent governing Acts of Congress, plaintiff Tribe has retained the sovereign right and power to determine whether to tax or not tax all sales by all retailers to all purchasers within the exterior boundaries of the Yakima Indian Reservation.

8.8 Plaintiff Tribe in the exercise of its sovereign power, absent any governing Acts of Congress, in licensing and regulating member retailers and taxing sales of cigarettes by its licensed retailers to members, Indians, and non-Indians, has preempted within the Yakima Indian Reservation any licensing, registration, regulation of said retailers or taxation of any sales by said licensed retailers.

8.9 Plaintiff Tribe, in the exercise of its right of self-determination and self-government, has the sovereign right to be free of any state law requiring the licensing, registration, regulation of any tribal enterprise located within the Yakima Reservation and to be free from tax on any sales made by the Trade within said Yakima Indian Reservation.

8.10 Plaintiff Tribe's sovereign right to run its own enterprises without interference and to regulate its

member retailers and to tax all sales of these retailers for governmental purposes, within the Yakima Indian Reservation, absent governing Acts of Congress, must prevail over any duty non-member purchasers may have to pay any excise or sales tax to the State of Washington.

8.11 The rules, regulations and laws of the State of Washington that requires the Tribe and all tribally licensed retailers to be registered, make determination and inquiry as to the tribal membership of all purchasers and to record and report information regarding sales, is an unlawful and improper burden on Indian Commerce and is a burden that frustrates tribal self-government and conflicts with federal regulation or non-regulation of Indian Commerce.

8.12 The taxation by the State of Washington of sales by the Tribe to non-members within the Yakima Indian Reservation and the taxation of sales by licensed tribal retailers on the Yakima Indian Reservation to non-members is an unlawful and improper burden on Indian Commerce and is a burden that frustrates both Indian self-government and conflicts with federal regulation or non-regulation of Indian Commerce.

8.13 The rules, regulations and laws of the State of Washington that limit the purchase of unstamped cigarettes to intrastate purchasers, and requires the tribally-licensed retailer or the Tribe as a seller in Indian Commerce, to determine (at his or its jeopardy) the future use to be made of the cigarettes after sale on the Yakima Indian Reservation is an unlawful and improper burden on Indian Commerce, fails to provide constitutional standards of definiteness, is a burden that frustrates both tribal self-government and conflicts with federal regulation or non-regulation of Indian Commerce.

8.14 The State of Washington's regulations and laws that would place a duty to collect taxes from non-members of the Yakima Tribe and its members where no jurisdiction to enforce this duty exists or where procedure is not clearly delineated by the State, is an



improper and unlawful infringement on the rights of self-government and Indian Commerce and in addition establishes laws and regulations that are so indefinite that they fail to meet constitutional standards of definiteness.

8.15 Under State of Washington law, the first incidence of imposition of the state cigarette tax falls on the seller and not on the non-member purchaser. Alternatively even if such sale to a non-Indian purchaser is proper, controlling law places the burden of the tax on the Indian which is clearly an improper interference with Indian Commerce and self-government.

8.16 Taxation of a sale of cigarettes by a member retailer to non-member Indians and non-Indians by both the Tribe and the State would be improper and unconstitutional double taxation and the sovereign right of the Tribe to tax said sales within the Yakima Indian Reservation must prevail.

8.17 The collection of State of Washington cigarette taxes and sales taxes on the sale of cigarettes to other than "qualified purchasers" as defined by state law and regulation, or members of the Yakima Tribe would under economic circumstances substantially reduce tribal income and tribal taxes and likewise would substantially reduce the income of tribally-licensed retailers and therefore is an unlawful and improper burden on Indian Commerce and is a burden that frustrates both tribal self-government and conflicts with federal regulation or non-regulation of Indian Commerce.

8.18 The State of Washington has refused to consider any agreement of comity between the Tribe and State that would permit a taxation scheme to further tribal self-government and has by its actions in passing and promulgating its tax rules, regulations and laws sought to destroy the tribal tax and income base. This action if allowed will hamper or destroy effective tribal self-government.

8.19 The State of Washington in its attempt to collect taxes from non-members on sales by the Tribe and

its members to non-members within the Yakima Indian Reservation has limited its collection to actions against the Tribe and its members. Such action is discriminatory and an improper interference with tribal self-government and violates the due process and equal protection rights of the Yakima Indian Nation and its members.

8.20 The collection of State of Washington sales taxes on sales made by the Tribe to non-members within the Yakima Reservation under economic circumstances would reduce tribal income used for tribal purposes and is an unlawful and improper burden on tribal self-government and Indian Commerce.

8.21 That Chapters 82.24 RCW, 82.26 RCW, 82.08 RCW and 82.12 RCW and the promulgation and operation of Rule 192 (WAC 458-12-192) and procedures to implement said rule (Excise Tax Bulletin No. 504.08.192) are inapplicable to the Tribe and its licensed retailers and/or are unconstitutional and unlawful.

8.22 That the plaintiff Tribe has no effective remedy at law and the plaintiff Tribe and its members are entitled to declaratory and injunctive relief against the operation of Rule 192.

8.23 That the plaintiff Tribe is entitled to damages against the State of Washington in the amount of $150,000 for interference with its right to transact business and operation of its governmental powers.

8.24 The amount of cigarette taxes and sales taxes on the sale of cigarettes is confiscatory.

8.25 The State does not adequately compensate retail sellers for the cost of affixing cigarette tax stamps, keeping records or collecting excise taxes.

8.26 The Yakima Indian Nation is a sovereign Indian Nation and absent acts of Congress defendant may not ask relief against plaintiff Tribe.

8.27 Plaintiff should be awarded their costs and reasonable attorney's fees in this action.



**9. CONTENTIONS OF DEFENDANT STATE OF WASHINGTON.**

9.1 The State of Washington may require the Tribe and its tribally-licensed Indian retailers to collect and remit state excise taxes imposed on non-members of the Tribe making purchases of goods and services at retail within the exterior boundaries of the Yakima Indian Reservation.

9.2 Washington state sales tax (RCW Ch. 82.08), cigarette tax (RCW Ch. 82.24) and tobacco products tax (RCW Ch. 82.26) are imposed upon non-members of the Yakima Indian Nation making purchases of goods and services at retail within the exterior boundaries of the Tribe's reservation.

9.3 Washington may adopt and enforce reasonable rules and regulations to enforce state excise tax collection responsibility on retail sales of cigarettes, tobacco products, and goods and services by the Tribe and its tribally-licensed retailers to non-members of the Tribe. The rules and regulations contained in WAC 458-12-192 and E.T.B. 504.08.192 are reasonable and may be enforced against the Tribe and its tribally-licensed retailers.

9.4 A tribal tax imposed on tribally-licensed Indian retailers with respect to sales of cigarettes to non-members of the tribe does not preempt a state excise tax imposed upon non-members of the Tribe with respect to the same transaction.

9.5 Washington may classify as "contraband" unstamped cigarettes owned by the Tribe and intended for ultimate resale by tribally-licensed retailers to non-members of the Tribe in violation of state law, and may seize and sell such cigarettes in the manner prescribed by state law, whether such cigarettes are held on plaintiff-intervenor's Indian reservation or are in transit in interstate commerce to plaintiff-intervenor's Indian reservation from points outside the state.

9.6 Plaintiff-intervenor's damages resulting from the seizure and sale of unstamped cigarettes by the

state should be limited to the wholesale value of cigarettes, plus applicable tribal tax, reasonably intended for resale to members of plaintiff-intervenor's tribe for ultimate consumption. In the absence of records detailing actual sales to members of the Tribe, the amount of such cigarettes reasonably intended for resale for ultimate consumption should be determined by reference to tribal membership and average United States per capita consumption of cigarettes in the year in which the cigarettes were seized.

9.7 A reasonable estimate of the amount of state tax loss on sales of cigarettes by plaintiff-intervenor's tribal licensees during the period 1972 through 1976 is as follows:

| | |
|---|---|
| 1972 | $ 2,711,825.00 |
| 1973 | 404,972.00 |
| 1974 | 2,620,587.00 |
| 1975 | 2,336,094.00 |
| 1976 | 2,145,528.00 |
| TOTAL | $10,219,007.00 |

## 10. ISSUES OF LAW

10.1 Does this three-judge panel have jurisdiction over this cause under 28 U.S.C.A. §2281?

10.2 May the State of Washington impose upon the Yakima Indian Nation and/or licensed Indian retailers the obligation to collect cigarette and sales taxes on sales of cigarettes and other personal property on the reservation to non-members of the Tribe and remit them to the State where the Tribe has adopted ordinances taxing those same transactions?

10.3 May the State of Washington impose upon the Yakima Indian Nation and/or licensed Indian retailers the obligation to collect taxes on the sale of cigarettes and other personal property on the reservation to Indians other than members of the Yakima Indian Nation and remit such taxes to the State where the Tribe has adopted ordinances taxing these same transactions?



10.4 May the State of Washington impose upon the Yakima Indian Nation and/or its licensed Indian retailers the obligation to register with the State, ascertain the membership and non-membership of its purchasers, affix tax stamps and report said information to the State of Washington on sales of cigarettes and other personal property on the reservation to non-members of the Tribe?

10.5 Assuming the State has the authority to require the Yakima Indian Nation and/or its licensed Indian retailers to collect and remit taxes on such sales, may the State enforce collection of such taxes by confiscating as contraband cigarettes or other personal property within the State which is being shipped in commerce to the Yakima Indian Nation for resale to non-members of the Tribe?

10.6 Assuming the State has the authority to require the Yakima Indian Nation and/or its licensed Indian retailers to collect and remit taxes on such sales, may the State enforce collection of such taxes by confiscating as contraband cigarettes or other personal property being held by the Tribe or its retailers within the exterior boundaries of the Yakima Indian Reservation or lawfully levy and seize upon property of the Yakima Indian Nation to collect for taxes assessed against said Yakima Indian Nation.

10.7 In view of the immunity from suit of the Yakima Indian Nation, may the State of Washington attempt to seek relief against the Yakima Indian Nation without its consent?

## 11. EXHIBITS

The following exhibits were produced and may be received in evidence if otherwise admissible, without further authentication, it being admitted that each is what it purports to be:

### PLAINTIFF'S EXHIBITS

11.1 Bureau of Indian Affairs, Office of Reservation Programs "Social Economic Report on Yakima

Indians of the Yakima Indian Reservation," September 1975.

11.2 Treaty between the United States and Yakima Nation of Indians (12 Stat. 951) dated June 9, 1855. Ratified March 8, 1859.

11.3 A true copy of the record of official proceedings at the Council in the Walla Walla Valley, held jointly by Isaac I. Stevens, Governor and Superintendent, Washington Territory, and Joel Palmer, Superintendent Indian Affairs, Oregon Territory, on the part of the United States with the Tribes of Indians named in the Treaties, made at that Council, June 9 and 11, 1855.

11.4 Yakima General Council Resolution T-38-56.

**DEFENDANT'S EXHIBITS**

11.5 WAC 458-12-192

11.6 E.T.B. 504.08.192

## 12. ACTIONS OF THE COURT

12.1 On November 5, 1973, this Court issued a Temporary Restraining Order restraining the State and its agents and employees from engaging in any action or acting in any manner to assess a tobacco tax upon tobacco products being shipped from outside the State of Washington to the Yakima Indian Nation for delivery upon trust land, from engaging in any action or acting in any manner which interferes with such tobacco products while in commerce bound for delivery to the Yakima Indian Reservation and from engaging in any action or acting in any manner which attempts to levy upon the properties of the Yakima Indian Nation to collect tobacco taxes assessed against the Yakima Indian Nation.

12.2 On September 6, 1974, this Court issued a Preliminary Injunction enjoining the State and its agents and employees from engaging in any action or acting in any manner to assess a tobacco tax upon tobacco products being shipped from outside the State of Washington to the



Yakima Indian Nation for delivery upon trust land, from engaging in any action or acting in any manner which interferes with such tobacco products while in commerce bound for delivery to the Yakima Indian Reservation and from engaging in any action or acting in any manner which attempts to levy upon the properties of the Yakima Indian Nation to collect tobacco taxes assessed against the Yakima Indian Nation.

IT IS HEREBY ORDERED That the foregoing constitutes the Pre-Trial Order in the above entitled cause and that upon the filing hereof the pleadings pass out of the case and are superseded by this order, which shall not be amended, except by consent of the parties, or by order of the Court to prevent manifest injustice.

DATED this _____ day of _____, 1977.

_____
UNITED STATES DISTRICT COURT

The foregoing Pre-Trial Order is hereby approved.

/s/ _____ 2/4/77
Dean C. Smith — Date
Attorneys for Plaintiff

/s/ _____ 2/3/77
James B. Hovis — Date
Attorney for Plaintiff-Intervenors

/s/ _____ February 2, 1977
Richard H. Holmquist — Date
Attorney for Defendant

/s/ _____ February 2, 1977
Matthew J. Coyle — Date
Attorney for Defendant

The foregoing Supplemental Pre-Trial Order is approved as of this 22nd day of February 1977.

/s/ _____
John F. Kilkenny
United States Senior Circuit Judge

/s/ _____
William G. East
United States Senior District Judge

/s/ _____
Howard B. Turrentine
United States District Judge

## ADDENDUM

The following was inadvertently not typed in the foregoing Order, but is attached hereto and made a part hereof.

### 13. ISSUES OF FACT

13.1 What would be the economic effect on the plaintiff, its tribal tobacco enterprises, and the tribally-licensed cigarette retailers of the imposition of both the state cigarette and tobacco products taxes and the tribal cigarette taxes?

13.2 What would be the economic effect on the tribal taxing schemes and tribal self-government of the imposition of both the state cigarette and tobacco products taxes and the tribal cigarette taxes?

13.3 What would be the economic effect on commerce between Indians and non-Indians on the Reservation of the imposition of both the state cigarette and tobacco products taxes and the tribal cigarette taxes?

13.4 What would be the economic effect on the plaintiff tribe and its tribal enterprises of the imposition of the state sales tax on Tribal Enterprises on-reservation sales to non-members?

13.5 What would be the economic effect of the requirement that the tribe and its tribally licensed



retailers register, determine ultimate use of sales to members, keep records of sales to members, and report these records to the State of Washington.

13.6 What damages have the plaintiff Tribes suffered as a result of the seizures and threatened seizures by the State of Washington from January 1973 through November 1973?

## [EXHIBIT A-1]

### RESOLUTION T-20-71

WHEREAS, the sale, handling or distribution of cigarettes on trust or restricted property within the exterior boundaries of the Yakima Indian Reservation by Indians is exempt from taxation by the State of Washington; and

WHEREAS, this exemption arises under the Treaty between the U.S. Government and the Yakima Indian Nation; and

WHEREAS, the Yakima Nation has the sovereign power to regulate business and tax the same within the exterior boundaries of the reservation under said Treaty; and

WHEREAS, the present trade of cigarettes has been handled in such a manner as to show a need for regulating for the protection of Tribal treaty rights.

NOW, THEREFORE, BE IT RESOLVED by the Yakima Tribal Council meeting in regular session on this 8th day of October, 1970, a quorum being present, that:

SECTION 1. The provisions of this resolution shall be deemed an exercise of the power and authority delegated to the Yakima Tribal Council by the Yakima General Council (T-38-56) to regulate business within the exterior boundaries of the Yakima Indian Reservation, and require a Tribal Permit to conduct such business.

SECTION 2. On and after the effective date of this resolution, no person shall engage in the sale, or distribution of cigarettes or other tobacco products on trust or restricted lands within the exterior boundaries of the Yakima Indian Reservation without first having obtained and being a holder of a valid and sustaining Tribal Permit, visibly displayed in the place of business, to do so issued under the provisions of this resolution and without the Tribal permit imposed by this resolution.

SECTION 3. Any person who shall violate any of the provisions of this resolution shall be deemed guilty of a violation of the laws of the Yakima Indian Nation and shall be subject to imprisonment in the Tribal Jail for not more than ninety (90) days and by a fine [*sic*] of not more than One Hundred Eighty Dollars ($180.00) and or both such confinement and fine.

SECTION 4. The application for a Tribal Permit under this resolution shall be made to the Yakima Tribal Council and shall contain the following information:

(a) Name, age, date of birth, Yakima enrollment number, degree of Yakima blood and Tribal affiliation.
(b) Residence of applicant now and for the past five (5) years.
(c) The place of business and the allotment number.
(d) Provide a financial statement.
(e) Applicant's employment for the past five (5) years.
(f) Whether applicant owns trust or restricted lands within the Yakima Indian Reservation.

SECTION 5. A permit fee to sell or distribute cigarettes under this resolution shall be Twenty Five Dollars ($25.00) initially for said business license and a monthly permit fee of One Cent (1¢) per package of smallest container of cigarettes sold or distributed. Tender of the initial permit fee shall be made at the time of application and monthly permit fee shall be paid by the fifth (5th) of the first month following the month in which a permit is granted and by the fifth (5th) of each and every month thereafter. Payment of



the monthly permit fee shall be made by cash, cashier's check or money order to the credit of the Yakima Nation at the Cashier window of the Yakima Indian Agency and the permittee shall likewise mail at time of payment a notarized statement specifying number of packages sold in previous month, where purchased and name and location of place of business to Yakima Tribal Council, P.O. Box 632, Toppenish, Washington. Should permittee fail to make said payment or file statement by said date or should the Tribal Council find that the statement of sales is in error, the permit to sell cigarettes issued under this resolution shall be cancelled forthwith.

SECTION 6. In determining whether a permit shall issue the Yakima Tribal Council shall take into consideration ownership of the property, location of place of business, financial stability and experience of applicant. The applicant shall be both owner and operator of the business. The Yakima Tribal Council shall limit the number of Tribal Permits and location that will adequately service the area and their determination as to whether or not a Tribal Permit shall issue is final.

SECTION 7. A Tribal Permit to sell or distribute cigarettes or other tobacco products shall be applied for yearly on or before the 30th of June giving at that time a notarized statement of cartons and other tobacco products sold during the previous year and gross income derived therefrom, and further, provide the names of all employees and amount of income earned by each.

SECTION 8. The Yakima Tribal Council shall have the right and authority to examine the books at any reasonable time to verify the sales and salaries paid to employees.

SECTION 9. That owners organize and establish an equal price for their merchandise and an equal wage for all their employees in accordance with the employees ability to operate the business for the owner.

SECTION 10. That no benefits be derived by non-Yakimas from the sale of cigarettes, tobacco products, or other merchandise.

SECTION 11. Sales of cigarettes to the United States or to any department thereof which is directly operated and controlled by the government generally and sales of cigarettes upon which Tax Stamps issued by the State of Washington in the lawful amount have been affixed are not covered by the terms of this resolution.

DONE AND DATED on this 8th day of October, 1970 at the Yakima Indian Agency, Toppenish, Washington, by the Yakima Tribal Council by a vote of 10 for and none against.

/s/_____
Robert B. Jim, Chairman
Yakima Tribal Council

ATTEST:

/s/_____
Genevieve Hooper, Secretary
Yakima Tribal Council

**[EXHIBIT A-2]**

**RESOLUTION** T-57-74

WHEREAS, the sale, handling or distribution of cigarettes on trust or restricted property within the exterior boundaries of the Yakima Indian Reservation by Indians is exempt from taxation by the State of Washington; and

WHEREAS, this exemption arises under the Treaty of 1855 between the U.S. Government and the Yakima Indian Nation; and

WHEREAS, the Yakima Nation has the sovereign power to regulate business and tax the same within the exterior boundaries of the reservation under said Treaty; and

WHEREAS, the trade of cigarettes has been handled in such a manner as to show a need for regulating for the protection of Tribal Treaty rights; and



WHEREAS, litigation costs and need for funds in other Tribal programs necessitates an increase in tax and experience under T-20-71 shows the need for other amendments.

NOW, THEREFORE, BE IT RESOLVED by the Yakima Tribal Council meeting in regular session on this 31st day of January, 1974, A quorum being present, that:

SECTION 1. The provisions of this resolution shall be deemed an exercise of the power and authority delegated to the Yakima Tribal Council by the Yakima General Council (T-38-56) to regulate business within the exterior boundaries of the Yakima Indian Reservation, and require a Tribal permit to conduct such business.

SECTION 2. On and after the effective date of this resolution, no person shall engage in the sale or distribution of cigarettes or other tobacco products on trust or restricted lands within the exterior boundaries of the Yakima Indian Reservation without first having obtained and being a holder of a valid and sustaining Tribal permit, visibly displayed in the place of business.

SECTION 3. The application for a Tribal permit under this resolution shall be made to the Yakima Tribal Council and shall contain the following information:

(a) Name, age, date of birth, Yakima Enrollment number, degree of Yakima blood and Tribal affiliation.
(b) Residence of applicant now and for the past five (5) years.
(c) The place of business and allotment number.
(d) Provide a financial statement and/or credit reference.
(e) Applicant's employment record for the past five (5) years.
(f) Whether applicant owns trust or restricted lands within the Yakima Indian Reservation.

SECTION 4. A Tribal permit to sell or distribute cigarettes under this resolution shall be Twenty-five dollars ($25.00) annually and a permit fee of five

cents (5¢) per package of the smallest container of cigarettes sold or distributed. Tender of the initial permit fee shall be made at the time of application and other permit fees shall be paid at the time of each and every delivery of cigarettes.

SECTION 5. In determining whether a permit shall issue the Yakima Tribal Council shall take into consideration ownership of the property, location of place of business, financial stability and experience of applicant. The applicant shall be both owner and operator of the business. The Yakima Tribal Council shall limit the number of Tribal permits and location that will adequately service the area and their determination as to whether or not a Tribal permit shall issue is final.

SECTION 6. A Tribal Permit to sell or distribute cigarettes or other tobacco products shall be applied for yearly on or before the 30th of June giving at that time a notarized statement of cartons and other tobacco products sold during the previous year and gross income derived therefrom, and further, provide the names of all employees and amount of income earned by each.

SECTION 7. The Yakima Tribal Council shall have the right and authority to examine the books at any reasonable time to verify the sales and salaries paid to employees.

SECTION 8. That owners organize and establish an equal price for their merchandise and an equal wage for all their employees in accordance with the employees ability to operate the business for the owner. All employees shall be enrolled members of the Yakima Indian Nation.

SECTION 9. That no direct benefits be derived by non-Yakimas from the sale of cigarettes, tobacco products, or other merchandise.

SECTION 10. Sales of cigarettes to the United States or to any department thereof which is directly operated and controlled by the government and sales of cigarettes upon which Tax Stamps issued by the State of Washington in the lawful amount have been affixed are not covered by the terms of this resolution.



SECTION 11. Licensees shall purchase all tobacco products sold on licensed premises from or through the Yakima Indian Nation.

SECTION 12. Any person who shall violate any of the provisions of this resolution shall be deemed guilty of a violation of the laws of the Yakima Indian Nation and shall be subject to imprisonment in the Tribal Jail for not more than ninety (90) days and by a fine [*sic*] of not more than One Hundred Eighty Dollars ($180.00) and/or both such confinement and fine.

SECTION 13. Any permittee who shall fail to comply with the terms of this ordinance in any particular shall have his permit cancelled or suspended. Written notification of the grounds for said cancellation shall be given at least five (5) days prior to a hearing held before the Law and Order Committee to determine if the ordinance has been violated. Cancellation or suspension by said committee may be appealed to the Yakima Tribal Council.

SECTION 14. This resolution shall be effective upon its passage and approval and T-20-71 is hereby repealed.

DONE AND DATED on this 31st day of January, 1974 at the Yakima Indian Agency, Toppenish, Washington, by the Yakima Tribal Council by a vote of 10 for and none against (1 not voting).

/s/_____
Watson Totus, Chairman
Yakima Tribal Council

ATTEST:

/s/_____
Joe Sampson, Secretary,
Yakima Tribal Council

## [EXHIBIT A-3]

## RESOLUTION T-22-75

WHEREAS, the sale, handling or distribution of cigarettes on trust or restricted property within the exterior boundaries of the Yakima Indian Reservation by Indians is exempt from taxation by the State of Washington; and

WHEREAS, this exemption arises under the Treaty of 1855 between the U.S. Government and the Yakima Indian Nation; and

WHEREAS, the Yakima Nation has the sovereign power to regulate business and tax the same within the exterior boundaries of the reservation under said Treaty; and

WHEREAS, the trade of cigarettes has been handled in such a manner as to show a need for regulating for the protection of Tribal treaty rights; and

WHEREAS, litigation costs and need for funds in other Tribal programs necessitates an increase in tax and experience under resolution T-57-74 shows the need for other amendments.

NOW, THEREFORE, BE IT RESOLVED by the Yakima Tribal Council meeting in regular session on this 10th day of September, 1974 at the Yakima Indian Agency, Toppenish, Washington, a quorum being present, that:

SECTION 1. The provisions of this resolution shall be deemed an exercise of the power and authority delegated to the Yakima Tribal Council by the Yakima General Council (T-38-56) to regulate business within the exterior boundaries of the Yakima Indian Reservation and require a Tribal permit to conduct such business.

SECTION 2. On and after the effective date of this resolution, no person shall engage in the sale or distribution of cigarettes or other tobacco products on trust or restricted lands within the exterior boundaries of the Yakima Indian Reservation without first having obtained and being a holder of a valid and sustaining Tribal permit, visibly displayed in the place of business.



SECTION 3. The application for a Tribal permit under this resolution shall be made to the Yakima Tribal Council and shall contain the following information:

(a) Name, age, date of birth, Yakima enrollment number, degree of Yakima blood and Tribal affiliation.
(b) Residence of applicant now and for the past five (5) years.
(c) The place of business and allotment number.
(d) Provide a financial statement and/or credit reference.
(e) Applicant's employment record for the past five (5) years.
(f) Whether applicant owns trust or restricted lands within the Yakima Indian Reservation.

SECTION 4. A Tribal permit to sell or distribute cigarettes under this resolution shall be Twenty-Five Dollars ($25.00) annually and a permit fee of Two and one-quarter cents (2¼¢) per package of smallest container of cigarettes sold or distributed. Tender of the initial permit fee shall be made at the time of application and other permit fees shall be paid at the time of each and every delivery of cigarettes.

SECTION 5. In determining whether a permit shall issue the Yakima Tribal Council shall take into consideration ownership of the property, location of place of business, financial stability and experience of applicant. The applicant shall be both owner and operator of the business. The Yakima Tribal Council shall limit the number of Tribal permits and location that will adequately service the area and their determination as to whether or not a Tribal permit shall issue is final.

SECTION 6. A Tribal permit to sell or distribute cigarettes or other tobacco products shall be applied for yearly on or before the 30th of June giving at that time a notarized statement of cartons and other tobacco products sold during the previous year and

gross income derived therefrom, and further, provide the names of all employees and amount of income earned by each.

SECTION 7. The Yakima Tribal Council shall have the right and authority to examine the books at any reasonable time to verify the sales and salaries paid to employees.

SECTION 8. The owners organize and establish an equal price for their merchandise and an equal wage for all their employees in accordance with the employees ability to operate the business for the owner. All employees shall be enrolled members of the Yakima Indian Nation.

SECTION 9. That no direct benefits be derived by non-Yakimas from the sale of cigarettes, tobacco products, or other merchandise.

SECTION 10. Sales of cigarettes to the United States or to any department thereof which is directly operated and controlled by the government and sales of cigarettes upon which tax stamps issued by the State of Washington in the lawful amount have been affixed are not covered by the terms of this resolution.

SECTION 11. Licensees shall purchase all tobacco products sold on licensed premises from or through the Yakima Indian Nation.

SECTION 12. Pursuant to Section 41, Chapter 5 of the Law and Order Code, any person who shall violate any of the provisions of this resolution shall be deemed guilty of a violation of the laws of the Yakima Indian Nation and shall be subject to imprisonment in the Tribal Jail for not more than ninety (90) days and by a fine [*sic*] of not more than One Hundred Eighty Dollars ($180.00) and/or both such confinement and fine.

SECTION 13. Any permittee who shall fail to comply with the terms of this ordinance in any particular shall have his permit cancelled or suspended. Written notification of the grounds for said cancellation shall be given at least five (5) days prior to a hearing held before the Law and Order Committee to determine if the ordinance has been violated. Cancellation or



suspension by said Committee may be appealed to the Yakima Tribal Council.

SECTION 14. This resolution shall be effective upon its passage and approval and T-57-74 is hereby repealed.

DONE AND DATED on this 10th day of September, 1974 at the Yakima Indian Agency, Toppenish, Washington, by the Yakima Tribal Council by a vote of 10 for and none against.

/s/_____
Watson Totus, Chairman,
Yakima Tribal Council

ATTEST:

/s/_____
Joe Sampson, Secretary,
Yakima Tribal Council

**[EXHIBIT B]**

**STATE OF WASHINGTON DEPARTMENT OF REVENUE**
**OLYMPIA, WASHINGTON**

**WAC 458-20-192 (Rule 192) INDIANS, INDIAN RESERVATIONS**

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DEFINITIONS

The term "Indian reservation," as used herein, means all lands, notwithstanding the issuance of any patent, within the exterior boundaries of areas set aside by the United States for the exclusive use and occupancy of Indian tribes by treaty, law, or executive order which areas are currently recognized as "Indian reservations" by the United States Department of the Interior.

The following Washington reservations are the only "Indian reservations" currently recognized as such by the United States Department of Interior: Chehalis, Colville, Hoh, Kalispel, Lower Elwha, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Ozette, Port Gamble, Port Madison, Puyallup, Quileute, Quinault, Shoalwater, Skokomish, Spokane, Squaxin Island, Swinomish, Tulalip, and Yakima.

The term "Indian tribe," as used herein, means any organized Indian nation, tribe, band, or community recognized as an "Indian tribe" by the United States Department of the Interior.

The term "Indian," as used herein, means persons duly registered on the tribal rolls of the Indian tribe occupying an Indian reservation.

NOTE: For purposes of this rule, with respect to determining tax liability regarding any economic transaction or activity, the term "Indian tribe" includes only an Indian tribe upon and within whose Indian reservation such transaction or activity occurs, and the term "Indian" includes only a person duly registered on the tribal rolls of the Indian tribe upon and within whose Indian reservation such transaction or activity occurs.

Under the revenue laws of the State of Washington, the tax liability of Indians and of persons conducting business with Indians is as follows:

## BUSINESS AND OCCUPATION TAX

Indians and Indian tribes are not taxable with respect to business conducted by them wholly within an Indian reservation.

No deduction is allowed to others by reason of business conducted with Indians or Indian tribes within an Indian reservation.



## RETAIL SALES TAX

Indians and Indian tribes are not subject to the sales tax upon sales to them of tangible personal property or otherwise taxable services which are made wholly within an Indian reservation.

Sales of tangible personal property to Indians or Indian tribes by off-reservation persons are subject to the retail sales tax except where the seller makes actual delivery of the property sold to a point within an Indian reservation.

Sales of taxable services to Indians or Indian tribes are subject to the retail sales tax except where the services are rendered entirely within an Indian reservation.

Sales to persons other than Indians are subject to the retail sales tax irrespective of where delivery or rendition of services takes place. Thus, Indian and Indian tribal retailers are required to collect and remit to the state the retail sales tax upon each taxable sale made by them within an Indian reservation to persons other than Indians.

In order to substantiate the tax-exempt status of a retail sale made within an Indian reservation to an Indian purchaser, unless the purchaser is personally known to the retailer as an enrolled Indian, the retailer shall require presentation of a tribal membership card identifying the purchaser as duly registered on the tribal rolls of an Indian tribe under such lawful criteria as the tribal organization has established. A record shall be retained by the retailer of all tax-exempt sales to support the sales tax deduction on returns filed with the Department, identifying the dollar amount of the sale and indicating the name of the purchaser, tribal affiliation of the purchaser, the Indian reservation to which or within which delivery or rendition of services was made, and the date of sale.

## USE TAX

Indians and Indian tribes are not subject to the use tax upon the use of tangible personal property within an Indian reservation. However, Indians and Indian tribes will become liable for the use tax when any such property is placed into actual use outside the Indian reservation, irrespective of the fact that the first use of the property may have been within the reservation.

SPECIAL APPLICATION OF RETAIL SALES TAX AND USE TAX WITH RESPECT TO SALES OF MOTOR VEHICLES OR TRAILERS TO INDIANS AND INDIAN TRIBES. When motor vehicles or trailers sold to Indians or Indian tribes are licensed by the State of Washington at the time of sale, or at any time thereafter, a presumption is raised that such motor vehicles or trailers are for use on the highways of the State of Washington. When motor vehicles or trailers are licensed prior to delivery, dealers are required to collect the retail sales tax in every instance, regardless of delivery point. County Auditors must collect the use tax when Indians or Indian tribes apply for a license or transfer of registration unless the applicant can show that retail sales tax or use tax has previously been paid on the sale or use of the vehicle or trailer by the applicant.

## CIGARETTE TAX

Sales of cigarettes to non-Indians by Indians or Indian tribes are subject to the cigarette tax, since the tax is levied upon the non-Indian purchaser and the vendor is obligated to make precollection of the tax. Therefore, Indian or tribal vendors making, or intending to make, sales to non-Indian customers must purchase a stock of cigarettes with Washington state cigarette tax stamps affixed for the purpose of making such sales. However, Indians and Indian tribes may make purchases of unstamped cigarettes from licensed cigarette distributors for resale to qualified purchasers. For purposes of this



rule, "qualified purchaser" means (1) an Indian purchasing for resale within the reservation to other Indians, and (2) an Indian purchasing solely for his or her use other than for resale.

Delivery of unstamped cigarettes by a licensed distributor to Indians or Indian tribes must be by bonded carrier or the distributor's own vehicle to the Indian reservation. Delivery of unstamped cigarettes at the distributor's dock or place of business or any other off-reservation location is prohibited.

Revised November 12, 1976.

## [EXHIBIT C]

WASHINGTON STATE DEPARTMENT
OF REVENUE

**EXCISE TAX BULLETIN**

ETB 504.08.192 Issued November 24, 1976

## SALES TO OR BY INDIANS

The purpose of the bulletin is to outline procedures to implement Rule 192, as revised November 12, 1976, and to provide additional details for explanation of certain provisions of that administrative rule.

1. **Registration Requirements.** All retailers within an Indian reservation are required to collect sales tax (and cigarette tax) on sales to non-Indians. This means that Indian retailers and Indian tribe retailers are required to be registered to collect and remit to the State the applicable State and local sales tax and the cigarette tax on sales to non-Indians, but no registration fee is required for registration of such retailers. (Such a business license

fee is constitutionally impermissible under Moe v. Salish and Kootenai Tribes, 48 L Ed 2d 96.)

Retailers can accomplish registration by telephoning or going to any of the following offices of the State Department of Revenue:

| | |
|---|---|
| Aberdeen<br>2700 Simpson Avenue<br>P.O. Box 1018, 98520 | 532-2840 |
| Bellingham<br>2500 Elm Street, Suite A<br>P.O. Box 1176, 98225 | 676-2114 |
| Bremerton<br>Great N.W. Savings & Loan Bldg.<br>Lower Level, 5th & Pacific<br>P.O. Box 407, 98310 | 478-4961 |
| Ephrata<br>138 W. Division<br>P.O. Box 1184, 98823 | 754-3771 |
| Everett<br>2020 35th Street<br>P.O. Box 6, 98206 | 259-8566 |
| Longview<br>P.O. Box 339<br>1418 15th St., Weyerhaeuser Credit Union Bldg., Rm. 304, 98632 | 577-2015 |
| Mt. Vernon<br>416 Main Street (Monday only)<br>P.O. Box 278, 98273 | 336-2954 |
| Pasco<br>1600 C West Clark<br>P.O. Box 767, 99301 | 545-2442 |
| Port Angeles<br>1601 East Front Street<br>Bldg. 2, Suite A, 98362 | 457-8503 |
| Seattle<br>710 Second Avenue<br>901 Dexter Horton Bldg., 98104 | 464-6827 |



| | |
|---|---|
| Spokane<br>300 Northtown Office Bldg.<br>North 4407 Division, 99207 | 456-3140 |
| Tacoma<br>Rm. 207 Professional Bldg.<br>705 S. 9th, 98405 | 593-2874 |
| Vancouver<br>State Office Bldg.<br>904 Franklin Street<br>P.O. Box 787, 98660 | 696-6151 |
| Walla Walla<br>202 Drumheller Bldg., 99362 | 527-4306 |
| Wenatchee<br>1139 Princeton<br>P.O. Box 1945, 98801 | 663-1651 |
| Yakima<br>214 Liberty Bldg.<br>P.O. Box 407, 98907 | 575-2783 |
| Olympia Headquarters<br>412 General Administration Bldg.<br>Olympia, Washington 98504 | 753-5540 |

2. **Records to be Kept.** Sales to Indians, when delivery is made within the Indian reservation on whose tribal rolls such Indian purchasers are duly registered, are exempt from sales tax. But to demonstrate entitlement to make such sales without collection of tax, all retailers must retain, as a part of their books and records to be available for examination by the Department of Revenue as specified by RCW 82.32.070, the following for each sale:

a. Name of the Indian purchaser,
b. The tribal affiliation of the purchaser,
c. The Indian reservation to which or within which delivery was made, or within which retail services were rendered;
d. The dollar amount of the sale, and
e. The date of the sale.

Unless the Indian and his tribal affiliation are personally known to the retailer, the retailer must require

the purchaser to present a tribal membership card issued by the tribe in which the purchaser is registered.

3. **Measure of Sales Tax on Cigarette or Tobacco Products Sales.** Under the holding of our Court in Canteen Service, Inc. v. State (83 Wn 2d 761) and Tonasket v. State (84 Wn 2d 164) the cigarette tax and tobacco products tax apply upon the "first taxable event" in this state. This makes a different measure for the sales tax in the case of sales by Indians to non-Indians than is the case for a taxable sale by a non-Indian.

a. **Sale by an Indian to a non-Indian:** Here the first taxable event is the possession by the non-Indian and therefore the cigarette or tobacco products tax due on the sale is *not* a part of the selling price on which sales tax is due.

b. **Sale by a non-Indian:** Here the taxable incidence falls on the first handler, distributor, or seller and thus the first taxable event occurs when the products are first handled, distributed, or sold within this state. Since this occurs prior to the retail sale, the cigarette or tobacco products tax is a part of the selling price, even in the case of sales which are sales tax exempt under paragraph 2, above. Canteen Service, supra.

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## DEPOSITION OF CYRIL C. HERMANN

Held March 23, 1977
[Caption Omitted in Printing]

* * * *

[2] Be It Remembered that pursuant to Notice of Taking Deposition and on Tuesday, the 23rd day of March, 1977, commencing at the hour of 1:10 o'clock p.m. at the Federal Building, 450 Golden Gate Avenue, San Francisco, California, before me, Linda L. Russell, a Notary Public in and for the County of San Francisco, State of California, personally appeared

**CYRIL C. HERRMANN,**

called as a witness by the plaintiff, who, having been first duly sworn, was examined and testified as hereinafter set forth.

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Office of U.S. Attorney, Eastern District of Washington, Box 1494, Spokane, Washington, 99210, represented by Dean C. Smith, Assistant U.S. Attorney, appeared as counsel on behalf of the plaintiff, United States of America.

Hovis, Cockrill & Roy, P. O. Box 437, Yakima, Washington, 98907, represented by James B. Hovis, appeared as counsel on behalf of the intervenor-plaintiff, the Confederated Tribes and Bands of the Yakima Indian Nation.

Office of the Attorney General, Temple of Justice, Olympia, Washington, 98504, represented by Matthew J. Coyle, Esq., appeared as counsel on behalf of the defendant, the State of Washington.

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[3] It Is Stipulated between counsel for the respective parties that this deposition may be reported in shorthand by Linda L. Russell, a Certified Shorthand

Reporter, and thereafter to be transcribed under her direction into typewriting.

IT IS FURTHER STIPULATED that all objections, except as to the form of the question, and all motions are reserved until the time of the trial.

IT IS FURTHER STIPULATED that in the event the witness is instructed not to answer questions propounded by counsel, it shall be deemed that the Notary Public has so instructed the witness to answer but that the witness still refuses to answer on advice of counsel.

IT IS FURTHER STIPULATED that the witness need not sign said deposition before said Notary Public.

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[4]

**TUESDAY, MARCH 23, 1977 1:10 O'CLOCK P.M.**

(Whereupon on Tuesday, March 23, 1977 at 1:10 o'clock p.m. the deposition of Cyril C. Herrmann commenced with the following people present: Mr. Smith, Mr. Hovis, Mr. Coyle, the deponent and the court reporter.)

MR. HOVIS: First, I'd —

It's agreed between all the parties here —

I'm James B. Hovis, attorney for intervenor-plaintiff. And the plaintiff is present through Dean Smith. And the defendant is present through the appearance of Matthew Coyle.

It is agreed that this deposition is being taken for the purpose of introduction into the evidence at the trial to be held on March 28th, 1977 in Spokane, Washington.

MR. SMITH: Seattle.

MR. HOVIS: In Seattle, Washington — beg your pardon. And at that time if there are — at the time of its introduction, if there are any objections as to the questions — outside of the form of the questions, objections will be reserved until that time.

MR. COYLE: Well now, Mr. Hovis, let me attempt to set the record straight.



I intend to object here to the questions and preserve my objections for the Court.

[5]

MR. HOVIS: All right.

MR. COYLE: I certainly intend to object here. And then, of course, the witness may answer.

MR. HOVIS: Do you wish to present your objections now or would you rather wait and present your objections if it's to something besides the form of the question at the time of the trial?

MR. COYLE: I will present my objections now at the deposition and again at the time of the trial.

## CYRIL C. HERRMANN,

having been first duly sworn by the Notary Public, on his oath testified as follows:

## EXAMINATION BY MR. HOVIS

MR. HOVIS: Q. Would you give your name, please?

A. Yes. My name is Cyril Herrmann.

Q. What is the address of your residence?

A. My residential address is 425 Eucalyptus Avenue, Hillsborough, California.

Q. I've asked you to be a witness in this cause here today?

A. Yes.

Q. Would you give us your educational background beyond high school, Dr. Herrmann?

A. Yes.

I attended the Northern Illinois State University [6] in De Kalb, Illinois. And I received my Bachelors degree there.

And then I was in the Navy for three and a half years in World War II.

Following that, I attended the Stanford Graduate School of Business, from 1946 to 1948. I received a Masters of Business Administration degree there.

And I then went to MIT, the Massachusetts Institute of Technology, to join the faculty. I joined the faculty on the first of July of 1948. And in January of 1949 I enrolled in the doctoral program over at Harvard.

And from 1949 until June of 1953 I worked on my doctorate while still continuing to teach a full-time load at MIT.

And I received my Doctor's degree from the Harvard Business School, but it was a joint program with the School of Economics, so that my degree is really in Applied Economics.

My major field of concentration at Harvard was in the field of Marketing. And the major course I taught at MIT was Marketing. I taught Marketing there for six years.

And then in 1954 I joined the Arthur D. Little Company.

Q. And so, what is your discipline that you studied — how would you classify yourself? As —

A. I consider myself an Applied Economist and I consider that Marketing is one of these areas of Applied Economics.

[7] Q. You went to work for Arthur D. Little, Inc. in 1954?

A. That's correct.

Q. And you have been employed by them since?

A. That's correct.

Q. What is your position with the company today?

A. I'm the Western Regional Vice President and I'm headquartered in San Francisco.

Q. Would you explain a little to us about what Arthur D. Little Incorporated is?

A. Yes.

It's a large diversified consulting and research company. It was established in 1886, and it is I believe the oldest and largest private — by that, I mean non-governmental — research organization of this type in the United States.



We have about 1,800 employees in Arthur D. Little. Last year our total revenues were about $86 million and our total assets are about $42 million. So that we are a significant factor in the consulting and research field.

Our company has a number of offices. Our headquarters are in Cambridge, Massachusetts and we have offices in various parts of Europe and South America and Canada.

Here in the United States, in addition to our headquarters we have an office in Washington, D.C. And our western headquarters are in San Francisco.

We do a variety of things ranging from being involved in [8] space shots and the heat probes that are put into the moon on moon shots.

At one end of the very scientific end of our company ranging back through life science, we are I believe the largest private cancer research laboratory in the country.

We have one building at our headquarters that contains some thirty or 40,000 research animals in order to conduct all of this research.

And then ranging across fields of engineering and applied mathematics and operations research on into regular management consulting work. And then into various areas of public policy, where we would be working for Federal, State or local agencies on such issues as — oh, environmental impact statements or land use planning studies or — whatever the particular orientation of the agency might be.

About 60% of our business is done for private clients and the other 40% ranges across the various Federal, State and local agencies along with certain institutions and associations that we might also classify as having a public orientation.

Q. Now in your work for the company, do you work in the field of Applied Economics?

A. Yes, I do.

Q. What are some of the things that you've done in that regard?

A. Well, one of the areas in which I have been rather [9] active has been in various forms of land use, land planning and land development. I do not mean development of buildings and so on, but rather the planning, the economic planning and feasibility planning that is done before a development takes place.

But I do have a considerable background in the field of land and what to do with land and what the highest and best use of land would be.

In this regard for a number of years I have been a member of the Board of Trustees of the Urban Land Institute, which is headquartered in Washington, D.C. And this is a non-profit research organization made up of people from private industry and from various public agencies that share a concern with the best quality of planning that can be done in the use and development of land.

I'm also a Vice President of the Urban Land Institute. This of course is not my job; this is an associated professional activity that I carry on.

In a somewhat different area I have been active in the kinds of market studies and market analyses that take place if we're doing a study having to do with an organization that's investigating an expansion of its market or bringing out a new product, something of that sort.

These are corporate clients, which I prefer not to name, because usually we're working for the competitive advantage [10] of that particular company. And we do not necessarily have permission to identify them. But I believe it's well known that the Arthur D. Little Company works on a continuing basis for many of the large firms in the Fortune 500 List, plus quite a sizable number of medium-sized firms.

Then another area in which I have had some experience is in the field of taxation.

I would say that this is a much lesser amount of my overall consulting activity, but I am in charge of an



assignment that we're just completing for the Bank of America. And they funded a piece of basic research that was an investigation of the tax revenue requirements of the State of California over the next few years.

Then an investigation of sources of revenue, and then some assessment of whether we might want to have some changes in our tax laws and tax structure here in California.

Several years before that, I did a tax study for the Board of Supervisors here in San Francisco. And that had to do with an investigation of how the City and County of San Francisco would raise additional revenues at a time when taxes on residential property were equalized with commercial and industrial property. And our recommendations to the Board of Supervisors were carried forward in that instance.

There are other related areas of Applied Economics that I'm active in. One of these is in the field of travel and [11] tourism. That has been significantly an international activity up until about six months ago when we were employed by the United States Senate Commerce Committee to do the research that would be helpful to the Senate in establishing a national tourism policy for the United States.

I also do some of my work in the field of education. I'm currently in charge of an assignment for the Glendale Unified School District in Glendale, California. And it is a cost impact study, measuring the increase in cost that might result from an organizational change that the district is contemplating.

So that after 1954 to 1977 — what is that? 23 years? I think I've had quite a broad and diversified consulting experience, but always with some unifying principle of Applied Economics and the feasibility of going ahead with some particular kind of economic activity.

Q. Now in line with your discipline and profession, did you visit the Yakima Indian Reservation?

A. Yes, I did.

Q. When was that visit?

A. It was approximately the middle of September. Well precisely, I visited there on September 14, 1976.

Q. When you were on the Yakima Indian Reservation did you visit their furniture factory?

A. Yes. My central purpose for being there was to visit [12] some of the smoke shops, but we had a little extra time and I asked if I might have an opportunity to stop and visit the furniture factory. And so I did have a chance to be taken to the factory by the Controller, and to gain some impression of it.

Q. Was it possible for you to visit the boat factory?

A. No. I saw the building because it was nearby, but I didn't have a chance to go through the factory itself.

Q. Or any of the other enterprises outside of the cigaret enterprise?

A. No.

I saw a salmon cannery, but I could not go through that. And I don't recall that I saw anything other than the furniture factory.

Q. How competitive is the furniture business?

A. Speaking in general terms, it's quite a highly competitive industry.

Design is important, of course. But designs also can be copied. And the particular situation of the furniture factory there on the reservation struck me as being quite highly competitive.

I was told, for example, that two operators had tried to successfully operate a furniture factory on that site in that building, and each had withdrawn apparently because it was not profitable. So —

[13] MR. COYLE: I'll object to that testimony on the grounds of hearsay.

THE WITNESS: I was told by the Controller that the tribe had taken over the furniture factory and were operating — it was operating it as a tribal enterprise and that they employed professional management.

There were about 95 employees. And as I recall, it was — about 65 of them were Indians from the



reservation. They sell in Oregon and Washington, according to the Controller. And I believe they use commissioned salesmen in order to carry out this end of the marketing.

And I recall that Sears & Roebuck is one of their important customers.

But the Controller also told me that they have to watch cost very carefully, and that it is generally quite a competitive undertaking. And that they have, of course, their share of competition.

MR. HOVIS: Q. Just one question before I go further:

The information you were receiving from the Comptroller and others on this visit was information that you were receiving as an expert economist to allow you to fulfill your work?

A. That's correct. That was my purpose in being there.

Q. Now we've talked a little bit about the competition of that specific area.

[14] Now generally, do you have any ideas or any opinions generally about the competition in the furniture business?

A. Well, my general background tells me that it's a competitive industry. It certainly has to be very cost conscious and of course it has to be quality conscious and design conscious too. But it's an established industry.

Location utility is fairly important. And being out there on the reservation, I presume that selling into the metropolitan markets of Oregon and Washington they would have a bit of a location disadvantage.

So that I could understand the Controller's emphasis that they have to be very careful about cost in order to remain competitive.

MR. COYLE: I'm going to have to object to that answer. It may be you can take care of it by rephrasing the question, Mr. Hovis.

The gist of it was that — as I recall, that you talked about a competitive disadvantage because of locational factors. You haven't identified any other

furniture manufacturer with whom they might compete.

To that extent, I have to interpose an objection.

MR. HOVIS: Your objection is noted.

Q. Do you have any opinion about the competitiveness of the boat-building industry?

A. Again, it's another industry that is quite competitive.

[15] But as I say, I did not have a chance to go through that particular plant.

Again, I accept the importance of design and quality in the boat-building field, just as it is true in furniture.

But in the final analysis the purchase decision will be importantly influenced by price once design and quality have been taken into account.

Q. Where was the industrial park where this boat-building factory was located and the furniture factory was located?

A. Well now, I don't recall precisely.

I believe it was on the west side of Toppenish, but I'm not certain. It was along the highway, anyway.

Q. I think you asked me this morning how to pronounce the name Wapato.

A. Yes. And that must be because I put in my notes that was the location.

Q. That was the location?

A. I have my notes here. May I consult them?

Q. Surely.

A. Yes. The industrial park — I visited the Mount Adams Furniture Factory there. I'm still not sure that I know how to pronounce it. So I'm glad to be instructed by you.

They had about 100,000 square feet in the furniture factory. My notes indicate it was built in 1967.

Q. But this location was distant from any metropolitan [16] center; was it not, Doctor?

A. Oh, yes indeed. It's remote from any metropolitan — well, when I say "remote" I mean it's more than 100 miles from any metropolitan center that I can think of.



Of course, that becomes a question of "metropolitan." But it would be what? About 165 miles from Seattle, something like that.

Q. Yes.

Where are most of the furniture manufacturing plants located in the West Coast?

A. Well, they tend to have a market orientation. I think you'd find that the general Southern California area would be one of the significant ones.

I can't tell you the situation in Puget Sound, but I would expect that if I were to look into that I'd find that there would be furniture manufacturing there.

Q. Now I want you to assume for the purpose of my question that all retail sales to non-Indians of both these boat and furniture products would bear a tax of 5.1¢ on each dollar.

What effect do you in your expert opinion believe this tax will have in regards to the seller of that furniture and boats?

MR. COYLE: I object to that question on the grounds that no proper foundation has been laid to document the witness' [17] expertise in the area of State and local finance.

MR. HOVIS: Q. Go ahead Doctor.

A. It's my understanding from visiting the furniture factory that they do not now pay such a tax, so that if this were to be imposed upon their price structure, if they had in effect to raise their price by that amount — and considering the relative locational disadvantage that they need to overcome, this could very well have the effect of taking away what profit margin they have.

In the nature of the industry, that could happen. And I should say here that I did not go over the books of the furniture factory with the Controller.

And so my response is more general than if I had analyzed their financial position.

But it's in the kind of industry where it could have the impact of putting them back into a loss position.

Q. Do you have an opinion of whether or not the collection of this 5.1¢ on every dollar of sales would cause a loss of profit to the seller?

MR. COYLE: Objection, for the same reason as before. And it's inconsistent also with the previous witness' testimony.

Your question asked him about 5% on sales. I believe the witness' testimony was that there is just a 5.1¢ tax on retail sales to non-Indians.

MR. HOVIS: Q. What effect would a 5.1¢ on each [18] dollar of retail sales to non-Indians have on those particular sales? Would it reduce the profit or —

A. It has the overall effect of increasing their selling price. I mean, that's what the ultimate effect is.

And that means that they have to find some way to reposition themselves in the market. And they're confronted then with either finding some way of lowering cost, like reducing the quality level of the product.

But then again they could very well lose customers because of that.

So that the likelihood is very great that the greatest impact would be in terms of reducing the economic viability of the enterprise.

Q. Now did you visit any of the tobacco retail outlets on the reservation?

A. Yes, I did.

Q. Would you describe how those are situated?

A. Yes. They're strung out along Highway 97. And the first — driving east from Yakima, the first one I stopped was the first smoke shop you encounter, which was the Triangle Smoke Shop.

And as I recall, that reservation extends some 35 miles from one side to the other. And so that the last smoke shop I visited was Holt-Brewer on the eastern extremity of the reservation.

[19] And then I visited several between those two, between those extremes.

Q. What do these smoke shops look like and what does the land situation involve?



A. They are very — extremely modest structures. It's not an exaggeration to say that they're almost shacks.

Some are nicely painted, and without exception I found them to be clean and so on. But there is very, very little investment in the structure.

Also, the structure tends to be very small. The selling space, I think in no instance would I estimate by eye that the selling floor itself exceeded 1,000 square feet. And I think that five or six hundred square feet of selling space would be about the average. This is an estimation by eye. I didn't get down and measure the dimensions of the selling floor.

They don't need very much storage space because they turn their inventory — oh, approximately two to two and a half times a month. And therefore, the little structure can be quite small.

Therefore, it's logical that it's on a piece of land that also is quite small. And I think the largest piece of land that I found was about a quarter of an acre.

And I believe that the Triangle Smoke Shop is on a piece of land that is — I was told about a tenth of an acre.

[20] In other words, the total land area seems to range between — oh, 5,000 and 10,000 square feet. That would be the total land area.

Frequently, the land area is irregular in shape, but always, of course, it's relevant to the highway.

Now not all smoke shops are right on the highway. But they all have an orientation so that they can be reached rather easily from the highway.

Holt-Brewer, for example, you need to turn off the highway and cross the railroad track before coming to his smoke shop. But there are signs which make it very easy to find it.

Q. What are their operating hours?

First, let me ask you: How many days a week were they open?

A. I think most of them, the ones that I talked with, stay open 7 days a week. And I think I have in my notes

the hours, but I don't know just where in my notes that is.

If I may, I'll answer your question this way, because I do not find in my notes a specific statement of the hours of each of these smoke shops. Rather, their hours are geared to the traffic on Highway 97.

And as I recall, they tend to open around 9:00 o'clock in the morning, but they stay open at night as long as it's feasible in terms of the afternoon and evening traffic on the [21] highway. And unless I were to go back and check in more detail I wouldn't be sure whether they all closed at the same time or whether they closed at different time schedules; and for that matter, whether the same smoke shop closes at the same time each day.

I do recall that the weekends tend to have somewhat different hours.

Q. How are these smoke shops staffed?

A. The typical operation will have the person responsible for the shop, and they will have, as is required, two additional employees. And they, the three of them rotate on a seven-day cycle.

Q. The — all the sales — do they take people on the premises?

A. Yes. The car will come off the highway and then it will drive up to the smoke shack, and most of the sales are made through a drive-in window; the same way you'd sell a drive-in hamburger. The car pulls up and the driver rolls down the window and the smoke shop operator slides open her window, and the car is close enough so that the cigarettes are handed out and money is handed in.

Upon occasion a car will park; the driver will go into the smoke shop. But more frequently it is a drive-in transaction where the driver doesn't get out of his automobile.

Q. I'm going to ask you to assume some figures here and [22] you can mark them down as you wish to — that we have in our Pre-Trial Order.

I'm going to ask you to assume first, that is the sales price of the cigarettes from these smoke shops are



$3.95. I'm going to ask you next to assume that the gross profit from the sale is 65¢ to the retailer.

I'm going to also ask you to assume that the same cigarettes off the reservation and on the reservation by non-Indian retailers to non-Indians have a total price of $5 a carton.

I'm going to ask you to assume that on the $5 a carton there is a State cigarette tax of $1.60 per carton and there is a State sales tax of 24¢ a carton —

MR. COYLE: Can we go off the record for just a minute, Jim?

MR. HOVIS: Yes.

(Discussion off the record.)

MR. COYLE: Back on the record.

MR. HOVIS: Q. I'm going to ask you also to assume that there is a Yakima Nation cigarette permit tax of 22 and a half cents per carton on the sales of all cigarettes by the Indian retailer to both Indians and non-Indians.

I'm going to next ask you to assume that if the State cigarette and sales tax was applied to the Indian sales to non-Indians that the average sales price would be $5.79.

[23] I'm going to also ask you to assume that if the non-Indian retailer sells to Indians on the reservation that the average sales price would be $4.76.

A. $4.76?

Q. $4.76.

And ask you also to assume that the sales to members of the tribe by Indians retailers would be $3.95.

I'm going to ask you also to assume that at least the majority of the sales by the Indian licensed retailers are to non-Indians. And therefore, that the majority of the sales would be at a $5.79 price.

What effect would this $5.79 price have on these enterprises in regards to their sales to non-Indians?

A. In my opinion, it would put the Indian smoke shops out of business.

I was quite interested in the demand elasticity situation when I was interviewing these smoke shops. And at the Triangle Smoke Shop I asked, "Why do you charge $3.80 for a carton of cigarettes," which was on that particular day of my visit for a particular carton that I was examining, a particular brand and so on — was the price. And I said, "Why don't you raise the price? If it's $5 at Safeway in Yakima, why do you only charge $3.80?"

And the response struck me as being very reasonable. There has to be a price incentive to offset the expense of [24] driving from Yakima out to the reservation, plus the time of the individual that's involved. So that at $3.80 the average sale, I was told, tended to be between two cartons and four cartons at the Triangle Smoke Shop. There is just enough incentive for people to drive out from Yakima to buy cigarettes there. And that really was an explanation that the operator of the smoke shop felt made sense for that operation, and that it was market competitive to be offering those cigarettes at that price.

Now by the time I got clear over to visit with Holt-Brewer on the eastern side of the reservation I found another kind of demand elasticity problem. His customers drive from the Tri-Cities, which is some 40 miles southeast of his smoke shop. And so, he simply isn't able to charge $3.80 a carton. And he told me that his average carton of cigarettes goes at $3.60 a carton.

But more than that, the people in the Tri-Cities will go together. And so you'll have, if you will, pooled purchases.

In other words, there would be four or five neighbors or friends and they'll all place their order. And then a single automobile will make that drive. And so the average size of sale, therefore, will also be larger. Holt-Brewer would sell six cartons, ten cartons or even more than ten cartons.

Now they may be different brands of cigarettes, and [25] some may be regular and some may be king-sized



because that one individual is filling several orders. And so, that's the economics of the Holt-Brewer operation.

Also, the people in the Tri-Cities could go to the State of Oregon.

When I was there, cigarettes were selling at, as I recall, $3.89 a carton over in Oregon. So that it's really a competitive business. And it's important that the smoke shops on the Indian reservation have this lower price because without the lower price there simply isn't any rational basis to drive all the way out to the Indian reservation to buy cigarettes. So that if you can buy cigarettes for $5 a carton at Safeway in Yakima and if you find you drive out to the Triangle Smoke Shop and you're asked to pay $5.79, it would of course be competitively irrational to complete such a purchase. And as soon as the buyer discovered that that was the price you could close that drive-in window on the Triangle Smoke Shop and put a padlock on it because there simply would be no basis to sustain that enterprise. It simply would have no alternative but to go out of business.

Q. If you would assume all the other facts that I've given, with one more assumption, that the total amount of sales to non-Indians would be 90% of the present volume, that 90% of the sales would have to be made at $5.79, how many — in your expert opinion, how many smoke shops would still be in [26] operation at the end of the year?

THE WITNESS: Would you read me the question, please?

(Record read.)

THE WITNESS: They would have to run some kind of a distress inventory. I mean, they would have to get rid of their inventory one way or another. Maybe the central warehouse would take the inventory back.

But there is simply no way to sustain the operation.

My answer would be zero.

MR. HOVIS: Q. Now in regard to the land use being made at these smoke shop locations, how would you —

Is that the highest and best use?

A. Very clearly.

I gave very careful examination to this question. And not only in my interviewing of the people running the smoke shops, but in my physical inspection of the general surroundings and of the retail activities.

I looked to see what other alternative land uses there were, and I was wondering about such things as franchise food operations, a fast-food operation, just an example.

But there were already some of these located in Toppenish. I think there were four that I counted there. And I believe that they were operated by non-Indian retailers rather than by Indians. That was the understanding I gained. But I didn't go personally to each of these fast-food shops and ask [27] that question.

I could find nothing that could compare with the kind of volume they're about to do from just a few hundred square feet of selling space, from a modest building of a very low investment and with a very small piece of land. It all boils down to this: It's the location utility of the land itself that had the real value in this retail operation.

And it's where the land is, its relationship to Highway 97, that is far and away more important than the building or anything else that goes on. But it assumes, of course, that they have a retail selling price that will create the traffic it takes to have those cars that are driving down Highway 97 pull off and buy cigarettes.

Q. Where does the economic burden of this — assuming that there would be an additional $1.84 placed on the present sales to non-Indians — where would the economic burden of that tax fall?

A. Well, the burden, the economic burden clearly will be borne by the people that are put out of business. The operator of the smoke shop and the employees who are paid to work there because they're simply — isn't going to be a business after this tax is imposed because it would be, as I said earlier, completely irrational for a



buyer to drive out to one of those smoke shops to make a purchase. So that the economic burden is borne by the people that are put out of work and put out of [28] business.

Q. Would the land have any economic burden, the land use have any economic burden?

A. The alternative land use for these odd, small parcels of land is very limited.

For example, I asked, "What's the size of this reservation," because it took us all day to visit these smoke shops and drive from one side of the reservation to the other. I was told, "Oh, there's something like 1.2 million —" In other words, 1,200,000 acres in the reservation.

Now if the average smoke shop has a total land area of between 5,000 and 10,000 square feet then we're talking about what? Three or four acres of land. So that to talk about alternative land use in terms of where these little smoke shops are located, you can only say, "Well, you know, could you sell diamonds; could you sell perfume?"

Well then, you get down to what kind of market these smoke shops are selling to.

And you have two problems. They're not really selling to people that are coming out to look for such high value luxury items. And of course the other problem is that the tribal enterprises are not at this point in time geared up to handle that kind of investment, that kind of management sophistication.

So that I would say there is really no practical [29] alternative land use for these specific locations where the smoke shops are located.

Q. Now in regards to the sales of furniture and boats and other like goods by Tribal Enterprises upon which the 5.1¢ per dollar tax would be imposed, where would the economic burden of that tax fall?

A. Assuming always that that furniture factory has to maintain its competitive posture in the market the extent to which this tax, this 5.1¢ tax were in any way to disadvantage the enterprise, the economic burden will be borne by the tribe through its involvement in The Tribal

Enterprise. And if it leads to people being laid off and reducing the labor force, then the Indians that are directly affected will bear that economic burden in an even more direct way.

MR. HOVIS: You may inquire.

## EXAMINATION BY MR. SMITH

MR. SMITH: Q. Just an extension of your testimony regarding the situation on furniture and boat sales.

You mentioned that the imposition of a 5.1% tax on retail sales to non-Indians of furniture and boats, for example, could very well, very likely have the effect of making that part of that enterprise not economically viable.

A. That's correct.

Q. Is there any way in your opinion that The Tribal Enterprise could pass on that tax in order to avoid such an [30] economic impact?

A. Of course, they can try.

But the thing that happens in the tax field is that if the tax is broadly applied then everyone passes on that tax and builds it into the selling price.

But we're confronted here with a uniquely different kind of situation. The Indians do not pay that tax. The tax is not levied against them. And so they have achieved a position in the market now. And the position they have achieved is without the imposition of the 5.1%.

This may very well have offset some of the other disadvantages that they had to overcome. So that they have to try to persuade their buyers that they're increasing their prices 5.1%, when none of their competitors is increasing his price by 5.1%.

And as I say, I did not examine the books and I cannot tell you therefore what the impact will be.

I can only say that the likelihood is that the impact of that 5.1% is going to have to be absorbed within the business rather than being passed on to the customer.

Q. Passing then to the matter of cigarette sales.



And as just a minor extension of what you were stating in answer to Mr. Hovis' question regarding the effect of the imposition of the State tax, increasing the price to $5.79 a carton, you gave as your opinion the economic effect of that [31] would be to close all of the smoke shops that one would operate.

A. That's right.

Q. It would not be economically feasible; is that right?

A. They couldn't cover the labor cost of staying open.

Q. Assuming that there were 10% or even 15% sales to Indian people which — from those smoke shops which are exempt from the State tax, would that make the operation of any smoke shop a viable possibility?

A. Well, of course the tribe would have to give consideration to — like, could they save one, for example? But where would you put it?

I've just testified earlier to the extent of this reservation. Only 1 million acres of land. And as I recall it's some 35 miles from the Triangle Smoke Shop to the Holt-Brewer Smoke Shop just down Highway 97.

And so you have to consider then the dispersal of population on the reservation.

I think rather you would probably try to work out some kind of a plan where you could have a little cigarette counter that was just an adjunct to something else that was going on or something else that was being done, like, you might have it where I attended the Tribal Council meeting, for example.

But I think you would also need to have these counters, if you will, in other locations. I'm afraid you could not go [32] to vending machine sales, because then you'd have no control over the retail sales. So that the tribe is really confronted with a difficult problem — for all practical purposes a $5.79 selling price puts all of the smoke shops out of business. That 10% or 15% volume that you're referring to that might be done on the reservation has to be accommodated then to a style of

retailing that only accommodates a little bit of labor at the time of the transaction, and that labor can be employed on other activities when the cigarette sales aren't going on. And I have no specific suggestion to offer to you just how that problem is going to be worked out.

Q. Would it then be your opinion that even as to that — well, say 10%, that there wouldn't be a viable economic reason for the existence of any retail cigarettes?

A. In my opinion, no, because the exsiting operations that I examined are geared to volume sales of cigarettes. And that would no longer be possible.

Q. All right.

Apropos of your testimony regarding the effect on land values, I don't know if you fully answered Mr. Hovis' question, and I'll ask you specifically.

Do you then — is it then your opinion that the economic burden of the imposition of this State tax falls upon the land itself?

A. The heaviest part falls on the land itself.

[33] And if I may, I may repeat a bit of what I said. But I'd like to answer this question fully.

Considering the land, labor and capital that's involved in operating smoke shops, the capital investment is quite modest. Considering the labor, you have the smoke shop operator, typically supported by two employees. They're not necessarily full-time employees; it depends upon the size of the particular smoke shop. But your total labor force is no more than three people.

Now of course, they will carry a very direct and immediate economic burden if they're thrown out of work. But viewing this as a going enterprise, you know, who reaps the reward of the activity?

And as it relates to land as opposed to capital that's invested in the building and the inventory, or as opposed to the labor, the real rationale for the success of any of these smoke shops is the location utility of the land itself. And if that's the main reason for the success of the smoke shop, then conversely the main burden — when a smoke shop is closed up — is if the value of that land falls



to something approaching — I say approaching zero, because obviously the land has some value, but the value of land always is a function of the economic activity that can be carried on upon the land.

And if you lose the highest and best use and there are no viable alternative uses, then your land drops to a very [34] nominal value. And so that economic burden is borne by the tribe.

MR. SMITH: That's all the questions I have.

MR. COYLE: Can we take a short ten-minute recess while I collect my thoughts?

MR. HOVIS: Sure.

MR. COYLE: Thank you.

(Recess taken.)

MR. COYLE: On the record.

## EXAMINATION BY MR. COYLE

MR. COYLE: Q. Dr. Herrmann, is there a recognized academic discipline known as Public Administration?

A. Yes, there is.

Q. Within that field is there a recognized academic discipline known as Public Finance?

A. Yes, there is.

Q. Do you have any training in either of those two fields, any formal academic training?

A. Yes, I do.

Q. What is the nature of that training?

A. I have, at both the Stanford and Harvard Business Schools, studied Finance.

In my consulting activities at Arthur D. Little, I've done a considerable amount of work for public agencies as opposed to corporations.

[35] And I have had teams of people working with me on a variety of issues where finance is a question.

And so that I have learned through my experience at Arthur D. Little something of the public finance side as opposed to the corporate finance side.

I might illustrate. I've just completed an assignment for the Port of Los Angeles, and the question there has to do with the expansion of the port. And the problem is whether or not the port can sustain any bond issue of $70 million. And we were associated with an engineering firm called Tudor Engineering, which did the physical evaluation of the port facilities. And I was in charge of the economic evaluation.

So that this would be in an area where you would commonly say, "This is public finance as opposed to corporate finance."

Q. Have you done any formal publishing in academic journals in the past ten years as opposed to regular — the work product of your company?

A. Yes, I had an article in the Harvard Business Review a few years ago. I don't recall the exact date, but I think it was about ten years ago.

I have had some of the things that I've written included as a chapter in a book.

And I've had papers included in the proceedings of conferences such as the Urban Land Institute and Pacific Area [36] Travel Association.

Q. Did any of those published articles — were any of them primarily devoted to the field of Public Finance?

A. Not per se.

Usually I'm concerned with an issue or a policy question.

But as I indicated earlier, as a general rule, I'm concerned with something in terms of its feasibility and viability. So that the question of finance, whether it's in either a corporate or public setting, is very frequently included.

Q. I believe you testified that you visited the Yakima Indian Reservation on September 14th, 1976; is that correct?

A. Yes, that's correct.

Q. What was the purpose of that visit?

A. To become familiar with the smoke shop operations. That was my primary purpose.



Q. Had you or your firm been hired by someone to familiarize yourself with that operation?

A. We were invited to consider it. And in our company we frequently ask and are given the opportunity for an assessment before we actually undertake an assignment.

For example, I follow up by writing what in our company we call a proposal, and if that is accepted it then becomes a contract.

[37] I would not have attempted to write that proposal without having first visited the reservation to inform myself generally about the Yakima Nation.

I had an opportunity to meet with the Tribal Council and then I had a specific opportunity to visit a number of these smoke shops.

Q. Did you write up this proposal?

A. Yes, I did.

Q. Did the proposal become a contract?

A. I believe that it either has — it's my understanding that it has been executed by the Yakima Nation.

It's addressed to the — Mr. Watson Totus, who is Chairman of the Yakima Indian Nation.

Q. Has this contract resulted in a written work product?

A. No, it has not.

Q. Is it ultimately intended to result in a written work product?

A. Not necessarily. The ultimate intent is that I will testify in Federal Court.

Q. In this particular case?

A. Perhaps I should say testify in court. I'm not a lawyer and I'm not sure what court I will be asked to submit my testimony.

MR. HOVIS: He asked: Was the proposal you made in regard to this particular case?

[38] THE WITNESS: My proposal has to do with the problem of the smoke shops if taxes are imposed. I include in my scope of work an assessment of the impact of

imposing Federal income taxes by the Bureau of Internal Revenue, which is another kind of tax problem.

I might add that I have testified as an expert before the Bureau of Internal Revenue.

MR. COYLE: Q. Turning to the furniture industry of the Yakima Indian Reservation.

Did you testify that Sears & Roebuck is a customer of that enterprise?

A. Yes, I did.

Q. Did you inspect the books and records of that furniture enterprise?

A. No, I did not.

Q. Did you make any attempt to?

A. I did not inspect any records.

Q. Did you make any attempt to determine to what extent the furniture enterprise sells to retailers; that is, as a wholesaler and to what extent it actually acts as a retailer to non-Indians?

A. I asked the Controller how they carried out their marketing operation, and he told me that they use commissioned salesmen and that they sell in Washington and Oregon. And it was at that point he said that Sears & Roebuck is an important [39] customer.

Now it was my impression that the commissioned salesmen sell to Sears & Roebuck. But that's only an impression. It may be that they sell directly to Sears; I don't know.

I did not ask specifically whether that furniture factory has any direct retail sales or whether it's 100% through commissioned salesmen.

Q. Dr. Herrmann, I'm going to ask you a question that's going to require you to make a couple of assumptions. You may wish to write them down.

Assuming that in the furniture industry it is a highly competitive industry at the producer level; that is to say, many producers. And further assume that the primary decision of a purchaser will be with regard to price. That is to say, as you testified earlier, when design, construction and various other factors are balanced out,



would a producer, a manufacturer of furniture who does not pay a tax, either net income or gross income for the privilege of producing furniture, have a competitive advantage over a producer who does pay such a tax?

A. That's the question?

Q. That's the question.

A. My answer, of necessity, has to be: It all depends upon the factors that are involved in establishing a competitive place in the market.

[40] If everything was exactly equal, if location was equal, if labor costs were equal, if everything were equal and the only variable were the tax, then of course there would be an advantage to the enterprise that does not pay the tax.

If the enterprise that has established itself in the market is dealing with all of the variables that enter into the enterprise, such as developing Indian labor and creating the skills and giving them the training so that they can get their productivity up to competitive levels in the industry, as an example, if — you know, if that cost of training and developing Indian labor is an added cost that would not be incurred if you moved into a metropolitan area where you could immediately tap an experienced labor pool that had already worked in the industry before, then you wouldn't have an offsetting problem that requires some kind of a break in the market to offset the fact that they're not paying taxes.

If my information was correct, that two previous operators had tried it, I'm led to the inference that there couldn't have been a great deal of margin available operating out of that Indian reservation location. That's why I believe that it's extremely significant in terms of the continued viability of that enterprise, the Mount Adams Furniture Factory.

If — without getting any other kind of a break in the variables of business — if the tax is simply added on top, then it's going to have a very significant adverse effect.

[41] Q. Are you generally familiar with the tax structure in the State of Washington?

A. No, I am not.

I — I have certain impressions about it, but' I'm not familiar with the overall tax structure.

About five years ago we did a study of the tax structure in the State of Washington, but although I had managerial responsibility I was not directly involved personally. And of course, that study is about five years old.

So that our company has some some knowledge of it, but I do not claim any particular expertise as an individual in the Washington tax structure.

Q. Is it your testimony that one of your primary fields of emphasis is in the area of marketing and marketing analysis?

A. Yes.

Q. Based upon your experience in that field, would it be your opinion that the primary purpose of locating smoke shops along Highway 97 would be to attract non-Indian customers?

A. Yes, I very definitely believe that.

Q. Do you have any knowledge about the price elasticity of cigarettes?

A. I believe I have some knowledge of that, yes.

Q. Would you say that the price elasticity of cigarettes is highly elastic or highly inelastic or somewhere in between?

A. It's in the direction of highly elastic. There are — [42] There are brand preferences, clearly, but it's a highly elastic price competition.

Q. Well, let me ask this question then:

Is the demand curve for cigarettes highly elastic or highly inelastic?

A. Highly elastic.

Q. Would you please explain what you mean when you say, "highly elastic" in terms of the effect on demand in price?



A. Yes.

Let's first of all assume that there is an adequate supply so that we're dealing now just with demand.

And let's accept that the prices are posted and are easily discovered and so that there is pretty good information available to the consumer.

And with that knowledge on the part of the consumer, and including here any slight monopolistic preference that would lead a person to pay a little bit more for a cigarette that has a particular filter or an extra milligram of length or something like that, those things are very minor. Cigarettes are sold almost like commodities because they're so standardized in terms of price. And so that the price mechanism is really the determinant of the demand elasticity for cigarettes.

Small changes in price can have a significant change on sales.

Q. In terms of total volume of sales?

[43] A. Yes, yes.

Q. Is that true of cigarettes as a whole, or is it true with reference to brand — switching from one brand to another?

A. It's true for cigarettes as a — generically speaking, it's true for cigarettes.

Q. Is that same principle applicable to the sales of liquor also?

A. I would say that it is in general terms.

I think there is less price elasticity in liquor than in cigarettes. That's an impression on my part.

But still liquor, again generically speaking, has price elasticity rather than inelasticity.

As I say, I think it's less true for liquor than for cigarettes.

Q. That is to say, as the price rises for liquor demand does not tend to be — does not tend to decrease as fast?

A. Quite the same way.

I'm thinking of our fair trade laws here in the State of California as one of the illustrations that there is

not quite the elasticity in liquor that there is in cigarettes.

Q. Do you base your testimony about the demand elasticity of cigarettes upon your own personal studies or upon readings in the literature?

A. I believe I would say both, if you would accept that I — every week I am continuously reading the business [44] literature. And whenever anything about cigarettes appears I'm very likely to be aware of it.

I say that as opposed to I haven't gone to the library and checked out a lot of books and made a — you know, a term paper on cigarettes or something like that.

Q. Dr. Herrmann, are you generally familiar with the term "shifting of taxes"?

A. In what context is the term employed?

Q. Well, let me ask you this:

Are you generally familiar with the term "shifting of taxes" as employed by economists?

A. It would be helpful if you told me which economist or economists you were referring to.

Q. Well, let me hand you a book here. The book is called *Principles of* — the book is *American Public Finance* by Shultz and Harriss. And on page 164 of that book they discuss the principle or the definition of shifting of a tax.

Right up at the top there, Dr. Herrmann.

A. Yes. I'd say I'm quite familiar with this. It's — in effect, it's passing the tax along from one level to another.

Q. And also on the same page, the authors talk about incidence of a tax. Are you familiar with the term "incidence of a tax"?

A. Yes.

Q. Will you please define "incidence of a tax" as you [45] know it?

A. Yes.

That's where you finally get to biting the bullet because you can't shift the tax any further.

Q. Is that synonymous with "economic burden of a tax"?



A. No, it is not.

Q. What does the term "economic burden of a tax" indicate?

A. Economic burden indicates where the hardship is going to be felt in terms of the operation that's under examination.

Q. When you say "where the hardship is going to be felt," what does that mean?

A. Well, yes, I'm glad to elaborate.

For example, if an Indian smoke shop on the Yakima Reservation has to charge $5.79 for a package — or for a carton of cigarettes you can say that you have shifted the tax forward to the non-Indian, who is supposed to drive up and pay $5.79 for that carton. And you can say that the incidence therefore is with the non-Indian driver that drives up.

But that's all theoretical. It's not real world. The real world burden is that you're putting these smoke shops out of business, and that it's the tribe and the Indians that are bearing the burden of the imposition of the tax. It's an Alice-in-Wonderland thing to say that the smoke shops have the privilege of charging of $5.79 a carton when there is no rational basis for anybody to ever pay that.

[46] Therefore, the burden falls on the tribe and the incidence and the shifting; it's just — it's theory. It's meaningless here.

Q. It would be your testimony then that the tribe and its retailers cannot shift the economic burden of the tax to their non-Indian customers?

A. That's correct.

Q. Why is that?

A. Because it would be a completely irrational act for a non-Indian buyer who can buy cigarettes at $5 a carton at Safeway in Yakima to drive all the way out to the reservation and then be asked to pay a higher price.

I've testified earlier that the Indians require a lower price in order to offset the disadvantage they have of being remote from markets.

So in order to get those automobiles that drive down Highway 97 to stop, there has to be a price incentive sufficient to offset the cost and the time inconvenience of driving out there to buy cigarettes.

So that for them $3.80 per carton is very competitive with $5 at Safeway in Yakima.

Q. In effect then the only way to attract these non-Indian customers to the reservation is to exempt the tribe from the duty of collecting the State tax?

A. Well, that's one workable mechanism. That's the [47] mechanism that's working at the present time.

They need a lower price.

Q. You testified earlier that the Holt-Brewer operation at the — I believe the southern end of the Yakima Reservation; that is, the end of the reservation closest to the Tri-Cities —

A. Yes, that's correct.

Q. — sells — has an average sale of eight to ten cartons.

A. I did say that.

Q. And upon review of your notes, have you come up with a different average figure?

A. Yes.

In looking through my notes while we took a break I was told by Holt-Brewer that the average sale is 20 cartons.

Q. That was under the circumstance where people would drive 40 miles from the Tri-Cities and buy for their neighbors; is that correct?

A. That's correct.

When I was there — and I didn't count up every carton — but a man drove up in an automobile and he bought four or five different brands. And that was what caused me to inquire, you know, can one man smoke all those different kinds of cigarettes?

And this man told me he was buying for his friends, and this is a procedure they go through.

[48] MR. COYLE: I have no further questions.



## FURTHER EXAMINATION BY MR. HOVIS

MR. HOVIS: Q. I think I forgot to ask you, Dr. Herrmann, what is your position with Arthur D. Little now?

A. I'm the Western Regional Vice President for Arthur D. Little.

Q. What is your area of supervision?

A. Well, the Western Region is the 11 western states, Alaska and Hawaii. And that's generally speaking my area of responsibility.

Q. Who is the Chairman of the Board of Arthur D. Little Incorporated?

A. General James Gavin is currently the Chairman, and he has been Chairman for some years. At the annual meeting of Arthur D. Little that will take place later this week, General Gavin is stepping down and becoming Chairman Emeritus because he's reached that age. And our new Chairman of the Board will be Robert Meuller. That's spelled M-e-u-l-l-e-r.

MR. HOVIS: That's all.

(Whereupon the deposition of Cyril C. Herrmann was adjourned at the hour of 3:00 o'clock p.m.)

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/s/_____

CYRIL C. HERRMANN

* * * *

[Jurat omitted in printing]

## STATE'S MOTION FOR PARTIAL NEW TRIAL

Filed May 22, 1978
[Caption omitted in printing]

Pursuant to Fed. R. Civ. P. 59(a)(2), the defendants hereby move for a partial new trial, the new trial to be limited to the issue of the power of the State of Washington to impose (1) its cigarette tax (chapter 82.24 RCW and the administrative regulations promulgated thereunder) upon non-Indian purchasers from Indians and (2) its sales tax (chapter 82.08 and the administrative regulations promulgated thereupon) with respect to these same transactions.

As grounds for this motion, defendants rely upon two decisions of the United States Supreme Court which clarify the source, nature, and limits of tribal power over Indians and non-Indians, but which were rendered after the decision of this Court and were, accordingly, not available to this Court in its consideration of this case. Those decisions are *Oliphant v. Suquamish Tribe,* ____ U.S. ____ (46 LW 4210, March 6, 1978), and *United States v. Wheeler,* ____ U.S. ____ (46 LW 4243, March 22, 1978). Defendants further rely upon a decision of the 10th Circuit, rendered February 17, 1978, *Ute Indian Tribe v. State Tax Commission of the State of Utah,* No. 76-1602.

As will be shown in the brief of defendants to be filed herein, the grounds relied upon by the majority in that portion of its decision as to which a new trial is being requested are completely inconsistent with those decisions.

DATED this 19th day of May, 1978.

/s/_____
SLADE GORTON
Attorney General

/s/_____
MATTHEW J. COYLE
Assistant Attorney General



## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Filed August 14, 1978
[Caption omitted in printing]

1. Notice is hereby given that the State of Washington, defendant above named, hereby appeals to the Supreme Court of the United States from that portion of the final judgment of the three-judge United States District Court for the Eastern District of Washington, entered May 10, 1978, granting plaintiff and intervenor-plaintiff:

(1) A declaratory judgment that the imposition of the State's cigarette taxing scheme under RCW 82.24, the administrative regulations promulgated thereunder, and any enforcement thereof by seizure or otherwise against the Tribe or its retail dealers are unlawful in that the State's taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government; and

(2) A declaratory judgment that the application of the State's sales tax to tribal cigarette sales to non-Indians has been preempted and that any attempted enforcement thereof or regulations promulgated thereunder are unlawful; and

(3) Permanently enjoining the State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them from imposing the State of Washington cigarette excise tax and sales tax to tribal cigarette sales.

2. The defendant State of Washington moved the United States District Court for the Eastern District of Washington for a partial new trial on that portion of its final judgment stated above. Said motion for partial new trial was denied on July 10, 1978.

3. This appeal is taken pursuant to 28 U.S.C. § 1253.

DATED this 10th day of August, 1978.

SLADE GORTON, Attorney General
State of Washington

Richard H. Holmquist
Sr. Assistant Attorney General

By: /s/_____
Matthew J. Coyle
Assistant Attorney General

Attorneys for Appellants-
Defendants

* * * *



SUPREME COURT OF THE UNITED STATES

No. 78-630

WASHINGTON, et al.,

*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, et al.

APPEAL from the United States District Court for the Eastern District of Washington.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

February 21, 1979

Supreme Court, U.S.
FILED
FEB 9 1979
MICHAEL RODAK, JR., CLERK

No. 78-630

# In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF WASHINGTON, ET AL., APPELLANTS

*v.*

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON*

## MOTION TO DISMISS

WADE H. MCCREE, JR.
*Solicitor General*

JAMES W. MOORMAN
*Assistant Attorney General*

EDWARD J. SHAWAKER
ANNE S. ALMY
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*

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# In the Supreme Court of the United States

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No. 78-630

STATE OF WASHINGTON, ET AL., APPELLANTS

*v.*

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON*

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## MOTION TO DISMISS

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The Solicitor General, on behalf of the United States, moves to dismiss this appeal on the ground that it is not within the jurisdiction of this Court.

### OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1-65) is reported at 446 F. Supp. 1339.

### JURISDICTION

The orders declaring Wash. Rev. Code 37.12, 82.08, 82.12, 82.24, 82.26, 82.44, 82.50, 82.24.090, 82.26.060,

82.08.050 and 82.08.070 invalid and enjoining their enforcement with respect to certain transactions were entered on May 10, 1978. By order filed July 17, 1978, the court denied a timely motion for a new trial. Notices of appeal to this Court from the portion of the district court's decision holding Wash. Rev. Code 82.44, 82.50, and 37.12 invalid were filed on July 12, 1978. A second notice of appeal to this Court from the district court's decision holding Wash. Rev. Code 82.24 invalid was filed on August 14, 1978.

## QUESTION PRESENTED

Whether a three-judge district court was properly convened under the former 28 U.S.C. 2281 to hear the claim that the State could not constitutionally seize shipments of cigarettes en route to an Indian reservation in interstate commerce.

## STATEMENT

This is an appeal from two cases heard by a three-judge court convened in the Eastern District of Washington. One of the cases, No. 3909 below (which we will refer to as the *Yakima* case), was brought by the United States of America on behalf of the Confederated Bands and Tribes of the Yakima Nation and their members (the Yakima Tribe). The Yakima Tribe intervened as a party plaintiff (J.S. App. 47). This action sought to enjoin the application of state cigarette, tobacco products, and sales taxes to tribal sales on the Yakima Reservation, and to enjoin the



enforcement of those taxes through the seizure by the State of tribal property (J.S. App. 47-48).

The other case, No. 3868 below (which we will refer to as the *Colville* case), was brought by the Confederated Tribes of the Colville Indian Reservation, the Lummi Indian Tribe, and the Makah Indian Tribe. The United States is not a party to the *Colville* case. That action sought not only to enjoin the application of the state cigarette and tobacco products taxes to tribal sales on the plaintiff tribes' reservations, but also to enjoin the application of state motor vehicle and trailer excise taxes to property located on the reservations and owned by tribal members or by the tribes (J.S. App. 3). In addition, the *Colville* case sought to enjoin state exercise of civil and criminal jurisdiction over the tribes and their members residing on the reservations (J.S. App. 3).

Although the parties stipulated that the cases be consolidated for hearing (J.S. App. 2), and a single opinion was issued, the cases remained otherwise distinct, and separate judgments were entered (J.S. App. 66-70, 71-74). Accordingly, our motion addresses only the appeal from the judgment in the Yakima case.

The Yakima Tribe is a federally recognized Indian tribe with a governing body, the Yakima Tribal Council, which is recognized by the Secretary of the Interior (J.S. App. 48). The Tribe occupies the Yakima Indian Reservation, established by the Treaty with the Yakimas, 12 Stat. 951, which encompasses approximately 1,390,000 acres in south-central Washington

(J.S. App. 48). The Tribe has a membership of more than 6,000, most of whom reside on the Reservation. Non-Indians and Indians who are not members of the Tribe also reside on the Reservation (*ibid.*).

The Tribe owns and operates several tribal enterprises on the Reservation, including furniture manufacturing, boat and housing component manufacturing, Indian arts and crafts, fish and food processing, and newspaper distributing (*id.* at 50 n.6). The Tribal Council has enacted a Tribal Ordinance that regulates and taxes the sale of cigarettes and other tobacco products on trust land within the Reservation (J.S. App. 142-145). The ordinance provides that all persons engaged in the business of selling cigarettes or other tobacco products on trust land within the Reservation must obtain a permit from the Tribe (*id.* at 142-143). The permittee must obtain his cigarettes from the Tribe, employ only members of the Tribe, and sell at a price fixed by permittees of the Tribe (*id.* at 143-144). The Tribe charges a fixed fee of $25 per year for a permit and 2.25 cents per package of cigarettes sold (*id.* at 143). In 1975, the Tribe collected more than $278,000 from the cigarette and tobacco products tax (*id.* at 49). The Tribe expended these monies on its programs for the educational, social, and economic advancement of its members (*ibid.*).

In 1972, the State of Washington assessed the Yakima Tribe $650,333.88 in cigarette taxes, penalties, and interest. The State subsequently filed



notices to withhold delivery of tribally purchased cigarettes with interstate common carriers and the United States Postal Service (J.S. App. 6, 47). After the present suit was filed, the district court restrained such actions pending resolution of this case (*ibid.*).

The State of Washington has enacted several taxing schemes that are at issue in this litigation. It imposes an excise tax on cigarettes in the amount of $1.60 per carton. Wash. Rev. Code 82.24.020. Although the tax is initially imposed on the wholesaler or retail dealer, the statute has been interpreted to impose the tax on the consumer if neither the wholesaler nor retailer had been subject to the state tax (*id.* at 20-23).[1] The State also imposes both a floor stocks tax and an excise tax on tobacco products other than cigarettes. Wash. Rev. Code 82.26.020; J.S. App. 23 n.15.

The state retail sales tax applies to each retail sale within the State unless taxation is constitutionally prohibited. Wash. Rev. Code 82.08.020. The tax is imposed on the buyer, but is collected by the seller. Wash. Rev. Code 82.08.050. If the seller fails to collect the tax, he is personally liable to the State for the amount of the tax (*ibid.*).

The State conceded that it cannot tax sales to members of the Tribe on the Reservation (J.S. App. 5).

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[1] A 1972 amendment added "possession" as a legal object of taxation, but exempted possession of up to two cartons of cigarettes. 1972 Wash. Ex. Sess. Laws, ch. 157, §§ 6 and 7. A 1975 amendment deleted the two-carton exemption. 1975 Wash. 1st Ex. Sess. Laws, ch. 22.

The State, however, has promulgated administrative regulations that require tribal retailers to register with the State and to maintain records that "demonstrate entitlement to make such sales without collection of tax." Wash. Excise Tax Bulletin 504.08.192 (November 24, 1976). The retailer must list each sale exempt from tax and demand tribal identification from purchasers personally unknown to him. *Ibid.*

After consolidation of the *Yakima* case and the *Colville* case for hearing, the district court held the cases pending this Court's disposition of *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976); and *Bryan* v. *Itasca County*, 426 U.S. 373 (1976). Following the decisions in those cases, the district court entered a single opinion (J.S. App. 1-65). In both of these cases, the court ruled that the three-judge court had been properly convened because Washington's application of state statutes authorizing seizure of property to tribally owned goods moving in interstate commerce raised substantial constitutional questions under the Interstate Commerce Clause (*id.* at 13-14, 47, 51).

Turning to the merits, the court concluded in both cases that the state tobacco products taxes constituted unlawful direct taxation of Indian income from on-reservation activities because the taxes fell on the tribal retailer and not the consumer (*id.* at 23, 52). Next, the court held that imposition of the state cigarette tax on sales taxed by the tribes was an unlawful interference with tribal self-government and was preempted by the tribal ordinances (*id.* at 34-41,



52). Finally, it held the record-keeping and reporting requirements imposed by the State's administrative regulations to be unauthorized by federal law and invalid (J.S. App. 30, 52).

In the *Yakima* case, the court also held that the state retail sales tax was not preempted nor an interference with tribal self-government except insofar as it applied to sales of cigarettes by tribal retailers. The court held that insofar as the sales tax applied to on-reservation cigarette sales, it was preempted by the Yakima tribal ordinance (*id.* at 52-58).

The court issued separate judgments (*id.* at 66-70, 71-74). Each order declared unlawful the application of state cigarette and tobacco products taxes to on-reservation sales by Indians to non-Indians, and restrained appellants from enforcing such taxes with respect to such sales (*id.* at 67, 69, 72-73). Each order declared unlawful the requirements that the tribal sellers record and report to the State on-reservation sales by Indians to non-Indians, and restrained appellants from enforcing such taxes with respect to such sales (*ibid.*). Each order declared unlawful the requirements that the tribal sellers record and report to the State on-reservation sales not subject to state taxation, and enjoined the enforcement of these requirements with respect to such on-reservation sales (*id.* at 68-69, 72-73). The *Yakima* judgment also included a declaration that the state sales tax on tribal cigarette sales had been preempted by the tribal ordinance, and it restrained the collection and enforcement of that tax in connection with on-reservation sales of

cigarettes by members of the Yakima tribe to non-Indians (*id.* at 72-74).

## ARGUMENT

Appellants seek to invoke this Court's jurisdiction under 28 U.S.C. 1253, which authorizes a direct appeal from an order granting an injunction in a suit "required by any Act of Congress to be heard and determined by a district court of three judges." We submit that this case[2] was not one required to be heard by a three-judge district court, and that consequently this appeal is not within the Court's appellate jurisdiction. See, *e.g.*, *Swift & Co.* v. *Wickham*, 382 U.S. 111, 129 (1965). Appellate review lies in the court of appeals. *Ibid.*[3]

The court below erroneously concluded that a three-judge district court was required by the former 28 U.S.C. 2281.[4] That statute provided that an injunc-

[2] We refer, of course, to the *Yakima* case.

[3] We bring the jurisdictional problem to the Court's attention not without embarrassment, since in the district court the government urged that a three-judge court was proper. See Plaintiff's Trial Brief 2-3 (filed February 28, 1977). The government only contended, however, that such a court was needed to hear the Tribes' claim that on-reservation sales were exempt from state taxation. As noted below, that contention is inconsistent with this Court's decision in *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481 (1976), and the district court accordingly declined to convene a three-judge court to hear that claim.

[4] Although Section 2281 was repealed by Section 1 of the Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119, it remained in effect with respect to suits pending at the date of the repeal, as this one was. Section 7, 90 Stat. 1120.



tion "restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute * * * upon the ground of the unconstitutionality of such statute" could be ordered only by a three-judge district court.

The court below correctly recognized (J.S. App. 13) that a three-judge court was not required to hear the Tribes' attacks on the state cigarette and sales taxes themselves, since those attacks raised "only Supremacy Clause issues which do not fall within the scope of 28 U.S.C. § 2281." See *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481 n.17 (1976); *Swift & Co.* v. *Wickham*, *supra*.

The court held, however, that a three-judge court was required because of the Tribes' additional attack on "the State's statutes providing for the enforcement of its taxing measures through the declaration and seizure as contraband of unstamped cigarettes moving in interstate commerce" (J.S. App. 14). Citing *Department of Employment* v. *United States*, 385 U.S. 355 (1966), and *Steffel* v. *Thompson*, 415 U.S. 452 (1974), the court concluded (J.S. App. 14 & n.11) that a three-judge court was required because the Tribes sought to enjoin state statutes on the ground they were unconstitutional as applied.

The district court's analysis ignored the distinction between "a petition for injunction on the ground of

the unconstitutionality of a *statute*, either on its face or as applied"—which requires the convening of a three-judge court under Section 2281—and "a petition seeking an injunction on the ground of the unconstitutionality of the *result* obtained by the use of a statute not attacked as unconstitutional," which does not require a three-judge court. *Turner* v. *Fouche*, 396 U.S. 346, 353-354 n.10 (1970) (emphasis in the original).

The district court characterized the claim of the Tribe and the United States as a "challenge of the State's statutes providing for the enforcement of its taxing measures through the declaration and seizure as contraband of unstamped cigarettes moving in interstate commerce" (J.S. App. 14).[5] As this statement itself indicates, the focus of the constitutional claim was on the *result* of the states officials' enforcement efforts, and not on the general statutory provision for enforcement of taxing measures through the seizure of untaxed goods. There is, of course, no state statute at issue which provides specifically for the seizure of goods moving in interstate commerce. Indeed, the court did not identify any specific state statute or statutes as the subject of the Tribal challenge (see J.S. App. 13-14).[6]

[5] A similar characterization of the issues is reflected in the supplemental pretrial order filed by the court on February 28, 1977. See *id.* at 2, 22, 26-27, 30.

[6] This case is distinguishable from *Query* v. *United States*, 316 U.S. 486 (1942), and *Department of Employment* v. *United States*, 385 U.S. 355 (1966), where three-judge courts were properly convened to consider whether state statutes



The United States and the Yakima Tribe argued, in essence, that state agents, in carrying out their statutory responsibility to enforce the State's excise tax, could not interfere with shipments travelling to the reservations in interstate commerce. Similarly, in *Phillips* v. *United States*, 312 U.S. 246, 252 (1941), a constitutional challenge to the actions of the state governor, taken pursuant to his statutory and constitutional authority, was held not to require a three-judge court because the challenge was aimed essentially at the constitutionality of the administrative action, not of the general statutory provisions. Cf. *William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171 (1939). In drawing this distinction in *Phillips*, the Court cautioned that the statutory provision for a three-judge court was not "a measure of broad social policy to be construed with great liberality," but "an enactment technical in the strict sense of the term and to be applied as such." 312 U.S. at 251. "The crux of the business," the court emphasized, "is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy." *Ibid.* See also *Ex parte Bransford*, 310 U.S. 354, 361 (1940) (footnote omitted): "Even where the statute is attacked as unconstitutional, [the three-judge court

having mandatory statewide application to all transactions of a certain type could constitutionally be applied to federal instrumentalities. Here, the enforcement provisions offer substantial discretion, and the United States and the Tribe contended that state officials could not enforce them in such a way as to interfere with interstate commerce.

provision] is inapplicable unless the action complained of is directly attributable to the statute."

The argument of the Yakima Tribe and the United States here did not threaten "state-wide doom" to a state legislative policy. They simply contended that state officers could not enforce the taxing statute by stopping certain shipments of cigarettes.[7] A three-

[7] The Amended Complaint filed by the United States did not refer to any specific state statute. It alleged (para. 14) that the conduct complained of—including the seizure of the shipments of cigarettes—was unlawful and improper in the following respects:

a. Defendant's actions are an unlawful interference with Indian commerce.

b. Defendant is unlawfully exceeding its jurisdiction.

c. Defendant's actions are an unconstitutional interference with commerce with and upon an Indian Reservation.

d. Defendant's actions are an unlawful interference with plaintiff as Congress has pre-empted the field of regulation of commerce in and to Indian Reservations.

e. Defendant's actions are an unlawful interference with the internal affairs of the Yakima Indian Nation and the licensed Indian retailers of the Yakima Indian Nation.

f. Defendant's actions are an unlawful levy and attachment of properties of the Yakima Indian Nation which are free from levy and attachment under treaty and under the express terms under which the State of Washington gained admission to the Union.

g. Defendant's actions are destructive of the commerce of the Yakima Indian Nation and its licensed Indian Retailers and fail to provide the Yakima Nation and its licensed Indian Retailers with due process of law.

The Complaint In Intervention filed by the Yakima Tribe



judge court was not required to hear that claim.

alleged (para. 11) that appellants' conduct was unlawful and improper in the following respects:

A. Defendant's actions are an unconstitutional interference with Indian and interstate commerce.

B. Defendant is attempting to make the Yakima Indian Nation a taxpayer contrary to state and federal law.

C. Defendant is unlawfully exceeding its jurisdiction.

D. Defendant's actions are an unconstitutional interference with commerce to and upon Indian Reservation.

E. Defendant's actions are an unlawful interference with plaintiff as Congress has pre-empted the field of regulation of the commerce of cigarettes in and to Indian Reservations.

F. Defendant's actions are an unlawful interference with the internal affairs and inherent sovereignty of the Yakima Indian Nation.

G. Defendant's actions are an unlawful levy and attachment of properties of the Yakima Indian Nation which are free from levy and attachment under treaty and under the express terms of Defendant's admission to the Union.

H. Defendant's actions are unlawfully confiscatory, destructive of the commerce of the Yakima Indian Nation and fail to provide the Yakima Nation with due process of law or equal protection of the laws pursuant to the United States Constitution.

The Yakima Complaint in Intervention, like the government's complaint, did not identify particular state statutory provisions, and the relief sought was a declaration that (Complaint para. C) "the several 'Notice and Order to Withhold and Deliver (continuing levy)' issued by defendants against numerous companies, businesses, and corporations regularly engaged and doing business in interstate commerce and transport are invalid and unenforceable for levying upon, attaching, or commanding delivery of plaintiffs' personal or other properties to the Department of Revenue of the State of Washington."

## CONCLUSION

The appeal should be dismissed.[8]

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

JAMES W. MOORMAN
*Assistant Attorney General*

EDWARD J. SHAWAKER
ANNE S. ALMY
*Attorneys*

FEBRUARY 1979

[8] The Court may wish to vacate the judgment of the three-judge court and remand for the entry of a fresh judgment from which appellants can perfect a timely appeal to the court of appeals. See, *e.g.*, *Phillips* v. *United States*, *supra*, 312 U.S. at 254.

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IN THE

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OF THE

UNITED STATES

OCTOBER TERM, 1978

**No. 78-630**

STATE OF WASHINGTON, ET AL.,

*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, ET AL.,

*Appellees.*

(continued on inside front cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

## BRIEF OPPOSING U.S. MOTION TO DISMISS

SLADE GORTON,
*Attorney General,*
*State of Washington*

RICHARD H. HOLMQUIST,
*Senior Assistant Attorney General*

MATTHEW J. COYLE,
*Assistant Attorney General*
*Attorneys for Appellants.*

Office and Post Office Address:
Temple of Justice
Olympia, Washington 98504
Telephone: (206) 753-5528

STATE PRINTING PLANT OLYMPIA, WASHINGTON

STATE OF WASHINGTON,

*Appellant,*

v.

UNITED STATES OF AMERICA,
and
CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,

*Appellees.*

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MATTHEW J. COYLE,
*Assistant Attorney General*
*Attorneys for Appellants.*

Office and Post Office Address:
Temple of Justice
Olympia, Washington 98504
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

## BRIEF OPPOSING U.S. MOTION TO DISMISS

## I. INTRODUCTION

This brief is in opposition to the Motion to Dismiss belatedly filed by Appellee United States[1] and

[1]In footnote 1 (p. 2) of our Brief Opposing Motions to Dismiss or Affirm, we noted that the last extension of time for the United States to file its Motion to Dismiss or Affirm had expired on January 8, 1979, that the United States had not filed its Motion as of that day, and that Washington State reserved the right to submit a reply to any Motion filed by the United States subsequent to its last extension. Not until February 6, 1979, did we receive telephone notification that the United States intended to file its Motion, some five weeks after the expiration of the last extension granted to United States for filing this Motion, and we did not receive the Motion until late February 12, 1979.

is submitted pursuant to Rule 16(4) of the Supreme Court Rules.

In its Motion to Dismiss, the United States contends that this Court lacks jurisdiction to entertain this appeal insofar as the United States is a party because the three-judge District Court was not required under 28 U.S.C. §2281.[2]

The arguments advanced by the United States are without merit. A three-judge court was properly convened because the complaints of the United States and intervenor Yakima Indian Nation—and the subsequent pre-trial order—raised substantial issues under the interstate commerce portion of the Commerce Clause. Furthermore, this eleventh hour[3] attempt by the United States to delay the ultimate resolution of this immensely important lawsuit flies in the face of a crucial policy underlying the enactment of 28 U.S.C. §2281—accelerated review on the merits of injunctions restraining the operation of important state policies. This Court should reject the position of the United States, note probable jurisdiction, and set the case for full briefing and argument on the

[2]28 U.S.C. §2281 was repealed by Act of August 12, 1976, Pub. L. No. 94-381, §1, 90 Stat. 1119. However this action is not affected since it was pending on the date of the repeal. At the time the three-judge District Court was convened to hear this cause 28 U.S.C. §2281 provided:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer or such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges under section 2281 of this title."

[3]See note 1, *supra*.



merits. Additionally, as noted by the United States, its Motion to Dismiss goes only to the "Yakima" appeal (No. 3909 below). The "Colville" appeal (No. 3868 below) was not consolidated for judgment and is properly grounded jurisdictionally. Therefore the Court's disposition of the "Yakima" appeal should not affect its disposition of the "Colville" appeal. See, *Butler* v. *Dexter*, 425 U.S. 262 (1976).

## II. ARGUMENT IN ANSWER TO CONTENTIONS OF THE UNITED STATES.

### A. A 3-judge court was properly convened because the complaints of the United States and intervenor Yakima Indian Nation raised a substantial federal question under the Interstate Commerce Clause, U.S. Const. Art. 1, §8.

As a general rule, 28 U.S.C. §2281 required the convening of a three-judge court wherever the enforcement of a state statute was sought to be enjoined on the grounds of its unconstitutionality. *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965). A three-judge court was not required where the claim of unconstitutionality was either "insubstantial", *Ex Parte Poresky*, 290 U.S. 30 (1933), or based on Supremacy Clause grounds, *Swift & Co.* v. *Wickham*, *supra*.

More recently, in *Goosby* v. *Osser*, 409 U.S. 512 (1973) this Court explained the standard to be applied in judging whether a constitutional claim is or is not substantial for 28 U.S.C. §2281 purposes.

> "A claim is insubstantial only if 'its unsoundness so clearly results from the previous decis-

ions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' " 409 U.S. at 518.

The three-judge court below found §2281 jurisdiction because the state sought to enforce the Tribes' asserted state cigarette tax collection responsibility by enforcing *state statutes* declaring and seizing as contraband unstamped cigarettes moving in interstate commerce to the Tribes' reservations. Consolidated Decision, Jur.St.App., p. 14.[4] In the lower court's view, the enforcement of these statutes raised substantial questions under the Commerce Clause.

The court was clearly correct. Classification of unstamped cigarettes as contraband and seizure thereof while moving in the stream of interstate commerce plainly raise issues under the Commerce Clause. Such state action has generated considerable litigation in the lower courts. See, e.g. *State* v. *Sedacca*, 249 A.2d 456 (Md. Ct. App., 1960); *Angelica Co.* v. *Goodman*, 52 Misc.2d 844, 276 N.Y.S.2d 766 (1966); *People* v. *Asta*, 337 Mich. 590, 60 N.W.2d 472 (1953); *Commonwealth* v. *Flickinger*, 165 Pa.Super. 95, 67 A.2d 779, affirmed, 73 A.2d 652 365 Pa. 59, cert. denied, sub nom. *Flickinger* v. *Commonwealth*, 340 U.S. 843,

[4]The state statutory scheme dealing with contraband cigarettes moving in interstate commerce to Indian tribes is as follows: Unstamped cigarettes, except those consigned to an Indian tribe authorized by the state to possess unstamped cigarettes, are contraband and subject to seizure and sale. RCW 82.24.250 (Appendix B hereto). Indian tribes are not authorized to possess unstamped cigarettes where the tribe makes sales to non-Indians. RCW 82.24.040. (Appendix A hereto). It is undisputed that the Tribes are making substantial sales to non-Indians, and hence *all* cigarettes bound for the Tribes are contraband and subject to seizure and sale under state statutes.



95 L. Ed. 618, 71 S.Ct. 33 (1950); *People* v. *Locrichio*, 342 Mich. 210, 69 N.W.2d 723 (1955).

The issues involve state interference with interstate commerce to enforce a tax on goods arising at the time the goods enter intrastate commerce; certainly these issues are sufficiently "substantial" to merit consideration by a three-judge panel. This is particularly so where this Court has never passed directly on the issues as applied to cigarettes; indeed, the Court specifically reserved the entire question of cigarette tax enforcement in *Moe* v. *Confederated Salish & Kootenai Tribes of the Flathead Reservation, supra.* See, *Moe*, 425 U.S. 15 468, n.6.

Finally, contrary to the United States' allegation, the court below did not ignore the distinction between the unconstitutionality of a state statute, on its face or as applied, and the unconstitutionality of the result obtained by use of a statute not attacked as unconstitutional. U.S. Motion to Dismiss, pp. 9-10. The court characterized the claim of the Tribe and the United States as a "*challenge of the State's statutes* providing for the enforcement of its taxing measures through the declaration and seizure as contraband of unstamped cigarettes moving in interstate commerce." Consolidated Decision, Jur.St.App. 14 (emphasis supplied). These state statutes were, of course, RCW 82.24.040 and 82.24.250, App. A and B hereto respectively.[5]

[5]True, the lower court did not specify the state statutes being challenged, nor did the parties do so in the several complaints or pre-trial orders. But there is no requirement that the challenged

In the context of the case at the time it went to trial, the challenge was to these statutes. *Moe, supra*, had already been decided, and it appeared (at least

statutes be set forth chapter and verse, so long as it is clear what statutes are being challenged. Here, it is clear from the pre-trial order filed February 28, 1977, that the state statutes dealing with contraband cigarettes moving in interstate commerce, RCW 82.24.040 and 82.24.250, were in issue. In that pre-trial order the United States characterized a part of its requested relief as follows:

"2.2 *Threatened Seizure of Shipments to Tribe.* Against the State, its agents, officers and employees for their allegedly wrongful and unlawful acts in threatening to seize as contraband cigarettes and tobacco products upon which state taxes have not been paid being shipped from outside the State to the Tribe intended for resale to licensed Indian retailers on trust property within the Yakima Indian Reservation for eventual resale to persons who are not members of the Tribe." Pre-Trial Order, p. 3.

The United States contended.:

"The seizure of unstamped cigarettes being transported to the Yakima Indian reservation in commerce by the state of Washington to enforce collection of cigarette taxes on sales by licensed Indian retailers to non-Indians is a violation of the commerce clause and the supremacy clause of the Constitution." Pre-Trial Order, p. 22.

In response, the state contended:

"9.5 Washington may classify as 'contraband' cigarettes owned by the Tribe and intended for ultimate resale by tribally-licensed retailers to non-members of the Tribe in violation of state law, and may seize and sell such cigarettes in the manner prescribed by state law, whether such cigarettes are held on plaintiff-intervenor's Indian reservation or are in transit in interstate commerce to plaintiff-intervenor's Indian reservation from points outside the state." Pre-Trial Order, p. 28.

The parties agreed that one of the issues for resolution was as follows:

"10.5 Assuming the State has the authority to require the Yakima Indian Nation and/or its licensed Indian retailers to collect and remit taxes on such [cigarette] sales, may the State enforce collection of such taxes by confiscating as contraband cigarettes or other personal property within the State which is being shipped in commerce to the Yakima Indian Nation for resale to non-members of the Tribe?"

In sum, it is abundantly clear from the pre-trial order that all parties were referring to state statutes (albeit not by statutory citation) dealing with classification and seizure as contraband unstamped cigarettes moving in interstate commerce to the Yakima Indian reservation, i.e, RCW 82.24.040 and 82.24.250.

In the lower federal courts it is recognized that a pre-trial order sets the dimensions of the case and controls the subsequent course of the action, both at trial and on appeal. See, e.g. *American Home Assurance Co.* v. *Cessna Aircraft Co.*, 551 F.2d 804 (10th Cir. 1977). Thus, even assuming that the complaints did not seek injunctive relief on Commerce Clause grounds, that claim was before the lower court at the time it issued its permanent injunction—the order which is the subject of this appeal, and should be regarded as controlling for purposes of this Court's appellate jurisdiction under 28 U.S.C. §1253.



to the state and the circuit court member of the 3-judge panel) that the only remaining controversies dealt with permissible methods of enforcing the tribally-licensed retailers' cigarette tax collection responsibility. One method was *the statutorily required* contraband procedure, RCW 82.24.040 and 82.24.250 —a statutory method clearly under challenge as applied.

The lower court understood—correctly—that these statutes were under challenge. At all stages of this litigation, from the filing of the complaint through final briefing and argument on the merits, the United States and the Tribe were attacking these statutes in large part on Commerce Clause grounds. To now claim otherwise is totally inconsistent with the record and at variance with the United States' representations to the court below. On this basis alone the Court should reject the arguments of the United States.

**B. A major policy underlying 28 U.S.C. §2281—accelerated review on the merits of injunctions affecting important state policies—is not served by routing this case through the Court of Appeals.**

As noted by this Court in *Swift & Co.* v. *Wickham*, 382 U.S. 111 at 119-120, the three-judge court procedure

> "* * * authorizes direct review by this Court, 28 USC §1253, as a means of accelerating a final determination on the merits; an important criticism of the pre-1910 procedure was directed at the length of time required to appeal

through the circuit courts to the Supreme Court, and the consequent disruption of state and regulatory policy caused by the outstanding injunction."

Here, to adopt the strained, hypertechnical position of the United States would do violence to the congressional policy of accelerated review of orders granting injunctions. The operation of important state tax policies are being disrupted by the injunction entered by the court below.[6]

There are no countervailing policy considerations dictating review of this case by the Court of Appeals. With the repeal of 28 U.S.C. §2281 in 1976, there is no longer any concern about minimizing this Court's mandatory docket in the interests of sound judicial administration. There is no reason to believe that this Court will benefit from additional analysis by the Court of Appeals—the issues were fully briefed by the parties and the court below entered an exhaustive opinion.

In short, justice is best served here by construing 28 U.S.C. §§ 2281 and 1253 as authorizing direct Supreme Court review of this case. The United States has offered no policy reasons—and we know of none—to delay ultimate resolution of the enormously important issues raised in this appeal. Further delay will only serve to exacerbate the controversy between

[6]The state is presently litigating these same issues with virtually every major Indian tribe in Washington. As a result of the injunction entered in the instant case, the state has felt obligated to enter into stay orders in this other litigation, agreeing not to enforce its cigarette tax on sales by reservation Indians to non-Indians. This has resulted in a revenue loss to the state currently running at an estimated $15 Million per year.



the parties and will contribute nothing to its correct resolution.

## III. CONCLUSION

For the foregoing reasons, the State urges this Court to deny the United States' Motion to Dismiss; note probable jurisdiction; and set this appeal for full briefing and argument on the merits.

DATED this 14th day of February, 1979.

Respectively submitted,

SLADE GORTON,
*Attorney General,*
*State of Washington*

RICHARD H. HOLMQUIST,
*Senior Assistant Attorney General*

MATTHEW J. COYLE,
*Assistant Attorney General*
*Attorneys for Appellants.*

## APPENDIX A

Revised Code of Washington Section 82.24.040

**82.24.040 Duty of Wholesaler.** Every wholesaler in this state shall, within a reasonable time after receipt of any of the articles taxed herein, cause the same to have the requisite denomination and amount of stamps affixed to represent the tax imposed herein: *Provided*, That any wholesaler who furnishes surety bonds in a sum satisfactory to the department, shall be permitted to set aside, without affixing the stamps required by this chapter, such part of his stock as may be necessary for the conduct of his business in making sales to persons in another state or foreign country, to instrumentalities of the federal government, or to the established governing bodies of any Indian tribe, recognized as such by the United States Department of the Interior. Such unstamped stock shall be kept separate and apart from stamped stock: *Provided further*, that every wholesaler shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state, or to a federal instrumentality, or to an Indian tribal organization, make a true duplicate invoice of the same which shall show full and complete details of the sale or delivery, whether or not stamps were affixed thereto, and shall transmit such true duplicate invoice to the main office of the department, at Olympia, not later than the fifteenth day of the following calendar month, and for failure to comply with the requirements of this section the department may revoke the



permission granted to the taxpayer to maintain a stock of goods to which the stamps required by this chapter have not been affixed. The department may also revoke this permission to maintain a stock of unstamped goods for sale to a specific Indian tribal organization when it appears that sales of unstamped cigarettes to persons who are not enrolled members of a recognized Indian tribe are taking place, or have taken place, within the exterior boundaries of the reservation occupied by that tribe.

## APPENDIX B

Revised Code of Washington Section 82.24.250

**82.24.250 Transportation of unstamped cigarettes —Invoices and delivery tickets required—Stop and inspect.** Every person who shall transport cigarettes not having the stamps affixed to the packages or containers, upon the public highways, roads or streets of this state shall have in his actual possession invoices or delivery tickets for such cigarettes, which shall show the true name and address of the consignor or seller, the true name of the consignee or purchaser, and the quantity and brands of the cigarettes so transported. If the cigarettes are consigned to or purchased by any person in this state such purchaser or consignee must be a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state. In the absence of such invoices or delivery tickets, or, if the name or address of the consignee or purchaser is falsified or if the purchaser or consignee is not authorized by chapter 82.24 RCW to possess unstamped cigarettes, the cigarettes so transported shall be deemed contraband subject to seizure and sale under the provisions of RCW 82.24.130.

Transportation of cigarettes from a point outside this state to a point in some other state will not be considered a violation of this section provided that the person so transporting such cigarettes has in his possession adequate invoices or delivery tickets which give the true name and address of such out-of-state



seller or consignor and such out-of-state purchaser or consignee.

In any case where the department or its duly authorized agent, or any peace officer of the state, has knowledge or reasonable grounds to believe that any vehicle is transporting cigarettes in violation of this section, the department, such agent, or such police officer, is authorized to stop such vehicle and to inspect the same for contraband cigarettes.

For purposes of this section, the term "person authorized by chapter 82.24 RCW to possess unstamped cigarettes" shall mean a wholesaler or retailer licensed pursuant to the provisions of chapter 19.91 RCW, the United States or an agency thereof, and any Indian tribal organization authorized to possess unstamped cigarettes.

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## MOTION TO AFFIRM

JAMES B. HOVIS
HOVIS, COCKRILL & ROY
*Counsel for Appellee,*
*Yakima Indian Nation*

316 North Third Street
P. O. Box 487
Yakima, Washington 98907
Telephone: (509) 575-1500

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JAMES B. HOVIS
HOVIS, COCKRILL & ROY
*Counsel for Appellee,*
*Yakima Indian Nation*

316 North Third Street
P. O. Box 487
Yakima, Washington 98907
Telephone: (509) 575-1500

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## MOTION TO AFFIRM

Appellee, Confederated Tribes and Bands of the Yakima Indian Nation, hereinafter called "Yakima Nation", pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the declaratory judgment and permanent restraint filed May 10, 1978 be affirmed on the ground that the questions are so unsubstantial as to not need further argument.

## TREATY PROVISIONS INVOLVED

Preamble, Article II, VIII, *Treaty With The Yakimas.* (12 Stat 951):

> Articles of agreement and convention made and concluded at the treatyground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the

year one thousand eight hundred and fifty-five by and between Isaac I. Stevens, governor and superintendent of Indian Affairs for the Territoy of Washington, on the part of the United States, and the undersigned head chiefs, chiefs, head-men, and delegates of the Yakama, Palouse, Pisquouse, Wenatshapa, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Ochechotes, Kahmilt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "YAKAMA", with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

* * *

ARTICLE 2. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries to wit:

[DESCRIPTION]

All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribes and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.



ARTICLE 8. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the Government of the United States and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactory proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities.

Nor will they make war upon any other tribe, except in self-defense, but will submit all matter of difference between them and other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

## QUESTIONS PRESENTED

Whether the imposition of the State of Washington's cigarette taxing scheme under RCW 82.24, the administrative regulations promulgated thereunder (particularly WAC 458-20-192 and EBT 504.08.192), and any enforcement thereof by seizure or otherwise against the Yakima Nation or its licensed dealers is unlawful in that the cigarette taxing scheme has been pre-empted by tribal ordinance and constitutes an unreasonable interference with tribal self-government.

Whether the imposition of the State of Washing-

ton's tobacco products taxing scheme under RCW 82.26, the administrative regulations promulgated thereunder and any enforcement thereof against the Yakima Nation or its licensed dealers is unlawful in that the legal incidence of the tobacco products tax falls upon the Yakima Nation or its licensed dealers and results in direct taxation of Indian income derived from on reservation activities and imposes an unreasonable intereference with tribal self-government.

Whether the imposition of the State of Washington's sales taxing scheme under RCW 82.08, the administrative regulations promulgated thereunder (particularly WAS 458-20-192 and EBT 504.08.192), and any enforcement thereof by assessment, seizure or otherwise against the Yakima Nation or its licensed dealers upon the sales of cigarettes is unlawful in that the sales taxing scheme has been pre-empted by tribal ordinance and constitutes an unreasonable interference with tribal self-government.

Whether the imposition of a requirement under RCW 82.08.070, 82.24.090, 82.26.060, WAC 458-20-192 and ETB 504.08.192 that the Yakima Nation and its members keep records of transactions declared (in one through three above) or conceded to be non-taxable is unlawful.

## STATEMENT OF THE CASE

The Yakima Nation objects to Washington's State-



ment of the Case in that it omits certain pertinent facts essential to a full and accurate statement.

Yakima Nation is a *sovereign* Indian tribe. Washington agrees and the court below so found. The sovereign Yakima Nation *explicitly* reserved the right to be governed by "their own government" and "their own laws".[1]

In its capacity as such a sovereign Indian tribe exercising its reserved powers, the Yakima Nation has established and is engaged in the operation of various business enterprises. One of these enterprises, an aircraft sales, charter and service business, is operated as a state chartered corporation outside of the exterior boundaries of the Yakima Indian Reservation and this enterprise pays all state taxes applicable to the operation of this business. State taxes regarding this enterprise is not in issue. The Yakima Nation also operated other businesses as tribal enterprises within the exterior boundaries of the Yakima Indian Reservation. These reservation businesses, that are solely owned and operated by the Yakima Indian Nation as tribal enterprises, are: timber harvesting, land rental and crop growing, furniture manufacturing, boat and housing component manufacturing, fish and food processing, Indian art and crafts creation, newspaper pub-

[1] *Record of Official Proceedings at the Council in the Walla Valley (June 9-11, 1855).* Filed as Yakima Appendix B in *State of Washington v. Yakima Nation.* October Term 1977, 77-388. Pp. 14-15 of Appendix B.

lication and cigarette distribution. The Yakima Nation asserts that all these enterprises, as operations of tribal self-government, are not subject to the state tax laws. Washington does not now dispute the exemption as regards the timber harvesting enterprise and the land rental and crop growing enterprise. However, Washington contends that the sales of all of these other enterprises, to other than enrolled Yakima members, were subject to state tax laws. Washington has not threatened or engaged in any enforcement procedure to collect sales taxes they contend are due on sales by these tribal enterprises.

The basic controversy arose over cigarette excise taxes on sales by licensed cigarette and tobacco retailers of the Yakima Nation. In its capacity as a sovereign, the Yakima Nation licensed certain of its members to sell cigarettes and tobacco from premises located on trust lands with the exterior boundaries of the Yakima Indian Reservation. By the enactment of a duly promulgated ordinance, approved by the United States of America; provisions were made for the licencing of member retailers and the imposition of a tribal tax of 22.5 cents per each carton sold by these licensed retailers. Licensed retailers were required to purchase their products from the Yakima Nation's tobacco distributing enterprise and in addition to the tax,



a gross profit inures to the benefit of the Yakima Nation.

Profit from the tobacco sales to its licensed retailers, profit from the operation of all tribal enterprises, and taxes collected from sales of tobacco products are used by the Yakima Nation to finance the functions of its tribal government. The Yakima Nation's annual budget, approved by the United States, is in the millions and provides extensive on-reservation governmental services to members and non-members. These enterprises also assist the Yakima Nation in decreasing the above-state average unemployment of its members.

Non-members purchased most of the cigarettes and tobacco products from the Yakima Nation's licensed cigarette and tobacco retailers. Washington summarily assessed its cigarette excise tax against cigarettes possessed and delivered by the tribal enterprise to its licensed retailers. The State also summarily levied a penalty, seized and sold these cigarettes and tobacco products being delivered in interstate commerce and applied the proceeds against the assessment and penalty.

Washington agrees and the court below found that the imposition of the state cigarette excise tax in addition to the Yakima Nation's tax on cigarette sales to non-members would destroy the business of the Yakima Indian Nation's licensed cigarette retailers and

the Yakima Nation's tobacco distributing enterprise.

The court below[2] declared as a basis for injunction, that:

1. *Cigarette tax:* The imposition of the State of Washington cigarette taxing scheme under R.C.W. 82.24, the administrative regulations promulgated thereunder (particularly WAC 458-20-192 and ETB 504.08.192), and any enforcement thereof by assessment seizure or otherwise against the Intervenor-Plaintiff Yakima Indian Nation (Yakima Nation) or its licensed dealers are unlawful in that the cigarette taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government.

2. *Tobacco products tax:* The imposition of the State of Washington tobacco products taxing scheme under R.C.W. 82.26, the administrative regulations promulgated thereunder, if any, and any enforcement thereof against the Yakima Nation or its licensed dealers are unlawful in that the legal incidence of the tobaccco products tax falls upon the Yakima Nation or its licensed dealers and results in a direct taxation of Indian income derived from on-reservation activities.

3. *Sales tax:*

A. Appplication to cigarette sales: The imposition of the State of Washington sales taxing scheme

[2] Appendix B to Jurisdictional Statement. Pp. 67-68.



under R.C.W. 82.08, the administrative regulations promulgated thereunder (particularly WAC 458-20-192 and ETB 504.08.192), and any enforcement thereof by assessment, seizure or otherwise against the Yakima Nation or its licensed dealers upon their sales of cigarettes are unlawful in that the sales taxing scheme on cigarettes has been preempted by tribal ordinance.

B. Application to sales of noncigarette enterprises: The imposition of the State of Washington sales tax under R.C.W. 82.08 on sales by the Yakima Nation's noncigarette retailers to non-Indians is neither preempted by tribal ordinance nor does it constitute an interference with tribal self-government.

*Collection, registration, and record keeping:* The imposition of a requirement under R.C.W. 82.08.070, 82.24.090, 82.26.060, WAC 458-20-192 and ETB 504.-08.192 that the Yakima Nation and its members keep records of transactions declared (in one through three above) or conceded to be nontaxable is unlawful. However, the imposition of requirements under ETB 504.-08.192, R.C.W. 82.08.050 and R.C.W. 82.08.070 that the Yakima Nation's noncigarette retailers register without fee with the Washington Department of Revenue, collect lawfully applicable taxes, and keep records as to taxable transactions is valid.

The lower court[3] therefore permanently restrained Washington from:

1. Imposing the State of Washington tobacco products tax upon the Yakima Nation and its licensed dealers on the Yakima Indian Reservation.

2. Imposing the State of Washington tobacco products upon the Yakima Nation and its licensed dealers on the Yakima Indian Reservation.

3. Requiring that such sales and sales to Indians be reported to the State of Washington; and

4. Engaging in any action or acting in any manner to assess such taxes upon the Yakima Nation or its licensed dealers or to seize cigarettes, tobacco products or their containers, or to confiscate such cigarettes, tobacco products or their containers, owned, possessed or sold by the Yakima Nation and its licensed dealers.

The lower court then remanded the reserved question of damages to a one judge district court for determination.

The question of the issuance of the permanent restraint on the lower court's interlocutory declaratory judgment has been appealed to this Court pursuant to 28 U.S.C. ¶1253.

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[3] Appendix B to Jurisdictional Statement. Pp. 69-70.



## THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

### A. Permanent Restraint and Declaratory Judgment adhere to this Court's standards.

The affirmance of the judgment and permanent restraint is clearly warranted. Washington ignores the lower court's careful adherence to the holdings of this court in *Moe vs. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976). *Moe*, Supra, explicitly reaffirms *McClanahan vs. State Tax Commission of Arizona*, 411 U.S. 164 (1973), and *Williams vs. Lee*, 358 U.S. 217 (1959).

The Court below, following this court's announced standards in *Moe vs. Confederated Salish and Kootenai Tribes*, Supra, found that Washington's applicable taxation scheme placed an unreasonable burden on the Yakima Nation's reserved powers of self-government or was a prohibited burden or tax falling directly on the Yakima Nation or its members. Washington's Jurisdictional Statement does not contest the lower court's findings of unreasonable or direct burden. Under Rule 15 (c), Revised Rules of this Court, the failure to raise these questions should foreclose plenary determination by this Court.

Washington's principal contention is that substantial federal questions exist because "the political, social and economic consequences of the lower courts holdings are far reaching". It requires not citation of authority

to establish that this Court feels that these non-legal considerations are better left to Congress.

Washington argues that the Yakima Nation does not possess the power to tax non-Indians on the Yakima Reservation. Again, Washington has failed to include this contention in its Statement of Questions presented. Even if Washington had complied with Rule 16 (c) of this Court's Revised Rules, this question is not before this Court. The incidence of the Yakima Nation's tax falls clearly on the sales transaction, is not determined by the status of the buyer, and is collected from the Indian licensed retailer.

However, the Yakima Nation has the power to impose a tax on all persons transacting business within the exterior boundaries of the Yakima Reservation. Washington agreed and the court below found that the Yakima Nation is a sovereign Indian Tribe. These sovereign powers include the power to tax.

The Yakimas were *explicitly* guaranteeed that they were to have "their own government" and were to have "their own laws".[4] Other treaties signed the same day as the Treaty with the Yakimas provide for submission to the laws of the United States but Article VIII of the *Treaty with the Yakimas* merely acknowledges dependency and does not provide for submission to the laws

[4] See Note 1.



of the United States.[5] The Yakima Treaty together with its legislative history in the Treaty Minutes, which are to be read in interpreting the Yakima Treaty, implicitly provides that these internal powers are exclusive.

The *Treaty with the Yakimas* clearly states that the signatory fourteen tribes and bands "for the purposes of this *treaty*, are to be considered as one *Nation*".[6] In *Worcester vs. Georgia* 6 Pet 515 (1832), Chief Justice Marshall explained the legal affect the use of the terms "treaty" and "Nation".

> "The term "Nation" so generally applied to them means a "people distinct from others". The Constitution, by declaring treaties already made, as well as those to be made, to be the Supreme law of the land, has adopted and sanctioned the previous treaties with the Indian Nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "Nation" are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, and have a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth.

[5] Compare Article 8 of the *Treaty with Yakima* with Article 8 of the *Treaty with the Walla Walla, Cayuse, etc.* Like Appendix B in note 1, supra, the later treaty is reproduced in 77-388. Yakima Appendix C. Also see: *Worcester v. Georgia*, 6 Pet. 515 (1832):

> "[T]he senate docketing of the law of nations is that a weaker power does not surrender its Independence — its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a state."

[6] Preamble. *Treaty with the Yakimas*, Supra.

> *They are applied to all in the same* sense.: (Italics supplied). 6 Pet. 559-560.

As such a nation, the sovereign Yakima Nation, possesses all of powers of sovereignty, including the power to tax, not limited by the treaty or later acts of Congress.

Article II of the *Treaty with the Yakimas* provides that the Yakima Indian Reservation is to be set apart for the exclusive use and benefit of the Yakimas and that no one except United States government personnel is to enter the reserved area without the permission of the Yakimas and the United States.[7] This Court, in *Williams vs. Lee*, 358 U.S. 217, 221 (1958), explained the legal afffect of that language:

> "[I]n return for (Indian) promises to keep peace, this treaty 'set apart' for their permanent home a portion of what has been their native country, and provided that no one, except United States government personnel was to enter the reserved area. *Implicit* in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester vs. Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government exists."

Absent a controlling Act of Congress, exercise of a tribe's sovereign powers preempts conflicting state laws. This court has so held in *Williams vs. Lee*, supra, at 220-221, and *Fisher vs. District Court*, 424 U.S. 382, (1976).

B. Whether the state may impose taxes, the legal incidence of which fall upon a non-Yakima reservation Indian, is not within this appeal and is not a substantial federal question.

[7] Article 2. *Treaty with the Yakimas*, Supra.



This Court has held that 28 U.S.C. ¶1253, is to be narrowly and stictly construed. *Gonzales vs. Automatic Employee's Credit Union*, 419 U.S. 90 (1974). 28 U.S.C. ¶1253 provides for an appeal from an order granting or denying an injunction. The lower courts determination regarding the exemption from direct taxation of a non-Yakima Indian, is not contained in either the lower court's interlocutory declaratory judgment or the injunctive relief. This Court has held that it is the order, and only the order, that is appelable, *Perez vs. Ledesma*, 401 U.S. 82 (1971).

In any event, the lower court's determination does not raise a substantial federal question. The distinction that Washington makes between Indian people is unwarranted. Congress has defined an "Indian" to be "all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction". 25 U.S.C. ¶479. The Secretary of Interior and other executive branches follow the same rule. See: C.F.R. ¶161.2; 25 C.F.R. ¶12.3 (c). The federal courts have always recognized the principle that an Indian is not lost from federal view and its protection when he is on a reservation other than his own. *United States vs. Kagama*, 118 U.S. 375 (1886), *United States vs. Dodge*, 538 F 2d 770 (8th Cir. 1976) and *United States vs. Ives*, 504 F 2d 935 (9th Cir. 1974).

## CONCLUSION

For the reasons stated herein, this appeal should be affirmed.

Respectfully submitted,

JAMES B. HOVIS

Of HOVIS, COCKRILL & ROY
*Counsel for Appellee*
Yakima Indian Nation

316 North Third Street
P. O. Box 487
Yakima, Washington 98907

Dec. 1, 1978

Supreme Court, U. S.
FILED
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IN THE

# Supreme Court of the United States

**October Term, 1978**

**No. 78-630**

STATE OF WASHINGTON, *et. al.*,
*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; AND MAKAH INDIAN TRIBE,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

## MOTION OF APPELLEE COLVILLE CONFEDERATED TRIBES, LUMMI INDIAN TRIBE AND MAKAH INDIAN TRIBE TO DISMISS OR AFFIRM

Steven S. Anderson
ZIONTZ, PIRTLE, MORISSET ERNSTOFF & CHESTNUT
*Counsel for Appellee Indian Tribes*

Office and Post Office Address:
600 - 1st Avenue
Pioneer Building
Seattle, WA 98104

November 30, 1978

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

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**IN THE**

# Supreme Court of the United States

**October Term, 1978**

**No. 78-630**

STATE OF WASHINGTON, *et. al.*,
*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; AND MAKAH INDIAN TRIBE,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

## MOTION OF APPELLEE COLVILLE CONFEDERATED TRIBES, LUMMI INDIAN TRIBE AND MAKAH INDIAN TRIBE TO DISMISS OR AFFIRM

The Appellee Colville, Lummi and Makah Indian Tribes, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument. Alternatively, and in addition, the Colville, Lummi and Makah Tribes [hereinafter referred to as the Tribes] move that those portions of the appeal relating to the validity of the State excise taxes on motor vehicles and to the State's assumption of partial territorial jurisdic-

tion over Indian reservations pursuant to RCW 37.12.-010, be dismissed on the ground that the appeal is not within the jurisdiction of this Court because the filing of the Notice of Appeal[1] was not timely.

## QUESTIONS PRESENTED

1. CIGARETTE TAX: Whether the imposition of the State of Washington cigarette tax pursuant to RCW Chapter 82.24 and the administrative regulations promulgated thereunder, as well as any enforcement against the Tribes or their licensed dealers, are unlawful in that the State cigarette tax has been preempted by the comprehensive tribal taxing ordinances or constitutes a prohibited interference with tribal self-government?

2. MOTOR VEHICLE, MOBILE HOME, TRAVEL TRAILER AND CAMPER TAXES: Whether the imposition by the State of Washington of a motor vehicle "excise" tax under RCW 82.44 and 82.50 on motor vehicles, motor homes, travel trailers, and campers, measured by a fixed annual percentage of the value of the vehicle, as applied to Indian-owned vehicles that are used both off and on the reservation, is unlawful as an infringement on the rights of the members of the Tribes as secured under federal statutes and treaties?[2]

3. PUBLIC LAW 83-280: Whether the State of Washington's exercise of civil and criminal jurisdiction under RCW 37.12, insofar as such jurisdiction has been assumed on a partial territorial basis as against the Lummi Indian Tribe and the Makah Indian Tribe or any of their reservation resident members, is unlawful as a denial of equal protection under the United States Constitution?[3]

1. The State has filed four Notices of Appeal in these cases. Appendix G, H, I and J. The reference here is to the issues raised separately in the Notice of Appeal to the Supreme Court of the United States, Civil No. 3868, dated July 10, 1978, Appendix G to the Jurisdictional Statement; Issues 6 and 7 in the Questions Presented portion of the State's Jurisdictional Statement.

2. The appellee Tribes contend that this issue is not properly before the Court because the Notice of Appeal raising it was not timely filed. See discussion of Motion to Dismiss, *infra*.



## STATEMENT

In the proceedings below, the three judge District Court determined that the State of Washington's cigarette tax, as applied to on-reservation sales of cigarettes by Indians to non-Indians, had been preempted by comprehensive taxing and regulatory ordinances enacted by the Tribes and that to allow the State to superimpose its taxes upon the tribally taxed sales of cigarettes would constitute an interference with tribal self-government prohibited by the decisions of this Court. The Court also struck down several State taxes on Indian-owned motor vehicles, mobile homes, campers and trailers which, although labeled as "excise" taxes by the State legislature, were identical in operation to the property tax struck down by this Court in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480-81 (1976). The Court also decided certain questions raised by the parties relative to Washington's assumption of civil and criminal jurisdiction pursuant to Public Law 83-280. The Public Law 83-280 issues raised by the State will presumably be resolved by this Court in *State of Washington v. Confederated Tribes and Bands of the Yakima Nation*, No. 77-388, already argued this term, and will not be discussed further here.

3. This issue, like the motor vehicle excise tax question, was raised by the State in a Notice of Appeal that was not timely filed. See Motion to Dismiss, *infra*.

In its Jurisdictional Statement at 7-9 the State argues that this appeal presents seven separate federal questions. However, the State seriously exaggerates both the complexity of the case and the substantiality of the issues presented. For example, the second question presented by the State is whether the State may require an Indian tribe or Indian retailers to collect State taxes from Indian purchasers who are not members of the tribe occupying the reservation where the sale occurs. Jurisdictional Statement at 8. Relative to the State cigarette tax issue, however, this question was not reached by the Court because of its determination in No. 3868, that the entire State taxing scheme, as applied to the Tribes, must fail. 446 F. Supp. 1339, 1365 n. 21, State Appendix A at 41 n. 21. Insofar as this issue was discussed by the Court in No. 3909 relative to the State sales tax applied to the Yakima Indian Reservation, 446 F. Supp. at 1371, State Appendix A at 54-55, it is a non-appealable dictum since it was not included in the District Court's final order. Appendix C at 71-74. This Court therefore lacks jurisdiction to review it pursuant to 28 U.S.C. §1253. *See* further discussion in brief of Appellee Yakima Tribe.

Question three, concerning the validity of the State's enforcement mechanisms and reporting requirements, to the extent it relates to the cigarette tax, is subsumed within the more general question of the tax's validity. If, as the Tribes contend, the District Court correctly determined that the State cigarette taxes cannot be applied to the Tribes, the enforcement questions are irrelevant.[4] Similarly, the District Court specifically determined that in light of its holding, it need not reach the questions regarding the legality of various enforcement measures such as confiscation of interstate shipments of cigarettes and levy against tribal property, which the State proposed to utilize. 446 F. Supp. at 1365 n. 21, Appendix A at 41 n. 21. Accordingly, this Court should not review questions 4 and 5 until the lower court has an opportunity to review them after remand if this Court determines the transactions are taxable and reverses the judgment below. The focus of the Tribes' remarks, therefore, will be on the correctness of the Court's resolution of the cigarette tax and motor vehicle tax issues.

4. Insofar as this question refers to the District Court's invalidation of the State's reporting requirements on tax-exempt sales to Indians for purposes of enforcing the State sales tax, it relates only to No. 3909 and will be addressed by the Appellee Yakima Tribe.



The facts, as stated by the State in its Jurisdictional Statement, although basically accurate, are inomplete and need amplification. As Appellant notes, the parties entered into an extensive Pre-trial Order stipulating to the essential facts regarding the contents, structure and operation of the tribal ordinances for the licensing, regulation and taxation of sales of cigarettes on the reservation. Similarly, there was no dispute as to the disastrous effect that superimposing the State cigarette and tobacco taxes on the tribally taxed on-reservation sales would have. It is these facts, of course, which underlie the District Court's conclusion that imposition of the State tax would interfere with tribal self-government.

The essential stipulations regarding the structure of the tribal taxing and regulatory systems and their place in tribal self-government are set forth in §§ 2.1 through 2.20 of the Pre-trial Order. As the Court noted, the tribally-levied cigarette taxes ranged in amount from forty to fifty cents per carton and the revenues were an important

source of funding for various programs sponsored by the Tribes for social and economic development. From 1972 through 1976 the Colville Tribe earned approximately $265,760 in cigarette taxes while the Lummi and Makah Tribes earned approximately $54,440 and $13,490, respectively. 446 F. Supp. at 1347, Appendix A at 7.

The Court correctly emphasized that the Tribal ordinances were exercises of police as well as taxing power. Each ordinance provides that tobacco products, including cigarettes, shall remain the property of the tribe until ultimately sold, requires the tribal dealer to obtain both tribal and federal traders licenses as well as adequate personal and property liability insurance, prohibits sales of tobacco products to minors and restricts the numbers of cartons of cigarettes that can be sold to non-Indians. Penalties are set forth in the ordinances for violations. 446 F. Supp. at 1347-48, Appendix A at 7-8. As the District Court summarized, "each ordinance reads as a comprehensive scheme for the licensing, regulation and taxation of the sale of cigarettes on the reservations." *Id.*

As to the economic and practical impact of the imposition of the State cigarette tax on the tribal programs, the Tribes presented affidavit testimony of an expert economist, undisputed by the State, that cigarettes are highly price elastic so that a small difference in price between competing sellers would have a substantial impact on purchasing habits. Because the tribal tax is smaller than the tax imposed by the State, a carton of cigarettes sells for approximately $1.10 to $1.20 less on the reservation than off, and approximately 90% of the tribal sales of cigarettes are made to non-Indians. 446 F. Supp. at 1347 and n. 5, Appendix A at 7-8 and n. 5. The District Court summarized the practical impact of imposition of the State tax as follows:



> The State tacitly concedes the Tribes' source of cigarette tax revenues would dry up if they were forced to add the State tax to the cost of their cigarettes. The facts dictate that the taxes could not be a continuing source of income if tribal cigarette sales to non-Indians are also subject to State's cigarette tax; tribal cigarette sales to non-Indians would be eliminated and the cigarette sales commerce between the Tribes and non-Indians would be destroyed. Thus, each Tribes' ability to fund its sponsored programs would suffer substantial interference.

446 F. Supp. at 1347, Appendix A at 7.

> In this case, both the State and the Tribes seek to tax non-Indians as a result of their on-reservation transactions with Dealers. The impact of superimposing the State's cigarette tax on the tribal taxes has already been discussed in this opinion. However, it bears repeating that at least with regard to a commodity as highly price elastic as cigarettes, the result will be the depletion of an already limited tribal tax base, probable destruction of the tribal enterprises and elimination of essential revenues needed for tribally sponsored programs.

446 F. Supp. at 1362-1363, Appendix A at 37.

In summary, therefore, the District Court determined, and the State has not and cannot dispute, that, as a factual matter, imposition of the State cigarette tax on the tribally-taxed and regulated sales of cigarettes to non-Indians will have a substantial impact on tribal self-government. The only question is the legal one, whether this constitutes a prohibited interference with tribal self-government within the meaning of *Williams v. Lee*, 385 U.S. 217 (1959) and subsequent cases.

## MOTION TO DISMISS

The Appellee Colville, Lummi and Makah Tribes hereby move to dismiss the portion of the State's appeal which challenges the Court's ruling on the validity of the State motor vehicle, travel trailer and camper excise taxing scheme as well as the portion concerning the invalidity of the partial assumption of territorial jurisdiction over the Makah and Lummi Reservations pursuant to RCW 37.12.010. This motion is made on the ground that Appellant did not file a timely notice of appeal within sixty days of the order appealed from as required by 28 U.S.C. §2101(b).

The chronology of events as disclosed in the State's Jurisdictional Statement and Appendix was as follows: On May 10, 1978, the Court's Declaratory Judgment and Decree of Permanent Restraint in No. 3868 was entered. Appendix B at 66. Included in the Order was the Court's determination of the inapplicability to the Tribes and their members of the State motor vehicle excise taxes as well as the invalidity of the State's assumption of partial territorial jurisdiction over the Makah and Lummi Reservations pursuant to RCW 37.12. On May 19, 1978, Appellant filed a Motion for Partial New Trial, Appendix D at 75, addressed exclusively to the issue of the validity of the State's application of cigarette and sales taxes to sales by the Tribes to non-Indians. On July 17, 1978, the three judge District Court denied the State's Motion for Partial New Trial, Appendix E at 77. On July 12, 1978, more than sixty days after the District Court entered its Declaratory Judgment and Decree of Permanent Restraint, the State filed a Notice of Appeal in Civil No. 3868 raising the motor vehicle ex-



cise tax issues and the Public Law 83-280 assumption of jurisdiction issues which had been decided adversely to the State by the Court. Appendix G at 81.

On August 14, 1978 the State filed a Notice of Appeal raising the cigarette tax issues. Appendix H at 24. This Notice was timely filed within sixty days of the denial of the State's motion for partial new trial. On September 8, 1978, the State filed an Amended Notice of Appeal, Appendix I at 87, raising all of the issues including the motor vehicle excise tax and Public Law 83-280 issues.

Ordinarily, of course, a petition for rehearing or motion for new trial suspends the finality of a district court judgment for purposes of appeal while it is pending. However, in the instant case, since the State's motion for partial new trial was specifically addressed by the State only to a portion of the District Court's judgment, it would seem that the motion did not affect the finality of the remaining portions of the judgment which were not challenged. Accordingly, the filing of the Notice of Appeal as to the issues unchallenged by the motion was not timely.

## MOTION TO AFFIRM

Alternatively, Appellee Colville, Lummi and Makah Tribes move to affirm the manifestly correct judgment of the three-judge court. No substantial federal questions are presented for the reason that the decision below scrupulously follows the well-established guidelines set by this Court for judging the validity of attempts by states to tax persons, property and transactions on Indian reservations.

**1. The District Court correctly determined that the imposition of the State cigarette tax pursuant to RCW 82.24 would, under the circumstances of this case, constitute an unlawful interference with tribal self-government.**

Clearly the cornerstone of the District Court's opinion is its conclusion that this case is distinguishable from *Moe v. Consolidated Kootenai and Salish Tribes*, 425 U.S. 463 (1976), because imposition of the State tax would directly and substantially interfere with the exercise of tribal self-government. In *Moe*, this Court concluded that Montana's requirement that an individual Indian seller collect a tax imposed on non-Indians was a minimal burden which did not frustrate tribal self-government within the meaning of *Williams v. Lee*, 358 U.S. 217, 219-220 (1959), or controvene any Congressional enactment dealing with the affairs of reservation Indians. In distinguishing *Moe*, the District Court noted:

> In *Moe* the cigarettes at issue were sold by individual Indians operating businesses and not by tribal enterprises. There was no indication that the sales of cigarettes were tribally financed, managed or regulated. Although the tribe apparently charged an administrative fee, no tribal tax was imposed on the cigarettes sold in the smoke shops, and the tribe itself received no direct benefits from the cigarette sales upon which it depended as a source of revenue for tribal programs. Thus, in the absence of any direct involvement by the tribe, the Court concluded that there was no interference with tribal self-government.

446 F. Supp. at 1364, Appendix A at 39-40.

In contrast, as noted above, the District Court concluded that in the instant case the *Tribes* themselves were directly involved in the conflict with the State, a conclusion grounded upon the stipulated facts. The Tribal ordinances



constituted a "comprehensive scheme for the licensing, regulation and taxation of the sale of cigarettes on the reservations" and the revenues generated were utilized for essential tribal programs.

Although the State has not disputed these facts, it asserts:

> Essentially, the Court below has held that an Indian tribe, *by a mere stroke of a pen*, can preempt State taxing power over non-Indians engaged in economic activities on an Indian Reservation.

Jurisdictional Statement at 17. (emphasis added). In light of the stipulated facts, the State's characterization is neither fair nor accurate; there is nothing in the record to support any implication that the tribal ordinances are an empty formalism, or anything less than the "comprehensive" system the District Court described. They are no more a "mere stroke of the pen" than is the State tax statute.

Nor is there any basis in the record to challenge the Court's conclusion (and the State's concession) that imposition of the State cigarette tax will be utterly destructive of this tribal structure and tax-generating system. The Court summarized this impact and the State's concession as follows:

> The revenue generated by the taxes today has been devoted to the partial funding of programs such as day care, education, nutrition, fire protection and alcoholism of reservation people. The bulk of the revenue derived from the tribal taxes comes from sales to non-Indians. The impact of imposing the State's cigarette tax in addition to the tribal tax will not only eliminate the tribe's competitive advantage but it will give off-reservation retailers a substantial price advantage. Thus, it is not hard to understand why the State conceded that: 'assuming that the Court finds that the

> State could require the Tribe and/or its retailers to add the State tax to its price of cigarettes sold to non-Indians, *it is painfully apparent that very few, if any, cartons of cigarettes would have been sold.*' (emphasis by Court)

446 F. Supp. at 1361-1362, Appendix A at 35.

While not contesting the detriment to the Tribes, the State argues that the impact was nevertheless not an interference with tribal self-government within the meaning of the Court's holding in *Williams v. Lee*, and that the Tribe's claim of exemption was, in effect, an assertion of "intergovernmental immunity", a doctrine whose application to Indian tribes was severely limited by this Court in *Mescalero Apache v. Jones*, 411 U.S. 145 (1973).

The District Court's answer to this argument is logically unassailable. The fact that the *Williams* "interference with self-government" test has been repeatedly reaffirmed by this Court since the intergovernmental immunity doctrine was limited in *Mescalero Apache* is a clear indication that the *Williams* test has an entirely independent life from the intergovernmental immunity doctrine. It is this principle, and not the doctrine of intergovernmental immunity, that is the source of the exemption.

In fact, a careful examination of the authorities makes it apparent that the interference with tribal self-government test was specifically tailored for the kind of situation now before the Court, where non-Indians are involved and both the State and the tribes have an interest in applying their laws to the transaction. In *Williams*, the Court observed:

> There can be no doubt that to allow the exercise of State jurisdiction here would undermine the authority



> of tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. *It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.* [citations ommitted] The cases in this Court have consistently guarded the authority of Indian governments over their reservations. (emphasis added)

358 U.S. at 223.

Similarly, in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), this Court observed that the *Williams* interference with self-government test was specifically designed for situations involving non-Indians:

> It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. [citation omitted] In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

*Id.* at 179.[5]

Similarly, in *United States v. Mazurie*, 419 U.S. 544 (1975), this Court observed that the *Williams* test was formulated by the Court "[i]n holding that the authority of tribal courts could extend over non-Indians, insofar as concerned their transactions on a reservation with Indians . . ." *Id.* at 544. More recently, in *Santa Clara Pueblo v. Martinez*, .... U.S. ...., 98 S.Ct. 1670 (May 15, 1978), the

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5. In effect, the State has conceded the applicability of the *Williams* test to the instant case by paraphrasing the Court's *McClanahan* language in its Jurisdictional Statement:

> Both the Tribes and the State can fairly claim an interest in taxing non-Indians on Indian Reservations.

Jurisdictional Statement at 20-21.

Court cited *Williams* for the proposition that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Id.* at 1681.

In short, the factual basis for the Court's conclusion that imposition of the State cigarette and tobacco products taxes would interfere with tribal self-government is uncontested; the applicability of the *Williams* test to these circumstances where "both the Tribe and the State could fairly claim an interest in asserting their respective jurisdictions" is indisputable in light of *McClanahan, Mazurie* and *Martinez.*

In its Jurisdictional Statement, the State argues that the District Court's holding elevates Indian tribes to the status of "full sovereigns" and to "a position of political power far outstripping that of the States themselves." Jurisdictional Statement at 18-19. The State's characterization is highly overstated. The District Court has done no more than hold, consistent with *McClanahan* and *Williams,* that when both the State and a tribe have an interest in applying their laws because of the involvement of non-Indians on a reservation, State law may not be applied if it will affect tribal self-government.

It must be emphasized that the District Court has applied the *Williams* test in a careful and limited manner. For example, the District Court held that the Tribes had the burden of establishing an interference with self-government:

> Outside the 'special area of State taxation' [where a State tax is invalid because its legal incidence falls upon a reservation Indian] the Tribes have the burden of establishing that a challenged State regulation 'frustrates tribal government, *see Williams v. Lee,* 358 U.S. 217, 219-220 (1959), or runs afoul of any Congressional enactment dealing with the affairs of reservation Indians, *United States v. McGowan,* 302 U.S. 535, 539 (1938) . . .'



446 F. Supp. at 1356-1357, Appendix A at 25, citing *Moe,* 425 U.S. at 483.

In addition, the Court specifically refused to hold that any merely theoretical conception of interference with the functions of government was sufficient to justify an invalidation of a State tax. 446 F. Supp. at 1363, Appendix A at 38.

The District Court stated:

> [W]hat the Courts must avoid is utilizing the *Williams* test to strike down such State regulation based on 'merely theoretical conceptions of interference with the functions of [tribal] government.' In other words, if a Tribe has proved and/or a State concedes that the State regulation causes actual interference with the performance of the governmental obligations, the Courts must, consistent with *Williams,* strike the regulation down.

446 F. Supp. at 1363-1364, Appendix A at 39.

Nor was an "indirect economic impact" sufficient to void a State tax, according to the Court. 446 F. Supp. at 1364, Appendix A. On the other hand, the Court concluded:

> A restriction of the State's taxing power in this case is justified by proof of an actual interference with, if not destruction of, the Tribe's ability to carry out their tax financed self-governing functions.

446 F. Supp. at 1365, Appendix A at 41.

The District Court's holding is manifestly correct and

scrupulously attuned to this Court's prior rulings. An affirmance of the judgment is therefore appropriate without further briefing.

**2. No substantial questions are presented regarding the power of Indian tribes to tax non-Indians.**

In its Jurisdictional Statement at 18, relying by analogy on this Court's holding in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), that Indian tribes do not have authority to try and punish non-Indians, the State argues that "[w]hether exercising the taxing power over non-Indians is inconsistent with the Tribes' status is an important federal question."

However, any question of an Indian tribe's power to tax non-Indians doing business on the reservation has been settled for almost three-quarters of a century. *See Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). *See also Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (9th Cir. 1956); *Barta v. Oglala Sioux Tribe*, 259 F. 2d 553 (9th Cir. 1958). Indeed, in the proceedings below, the State of Washington did not contest the authority of the Tribes to tax non-members purchasing cigarettes on the Reservation. The contention that the Tribes lack such power was not raised by the State until its Motion for Partial New Trial, filed after this Court's decision in *Oliphant*.

There is simply nothing in the *Oliphant* opinion itself to suggest that this Court intended to overrule well-established precedents supporting tribal authority to tax non-Indians. Central to the Court's analysis in *Oliphant* was its



conclusion from a detailed historical investigation that Congress, the Executive Branch and the lower courts shared an assumption that Indian tribal courts did not possess criminal jurisdiction over non-Indians, a view that this Court regarded as implicitly confirmed by its decision in *In Re Mayfield*, 141 U.S. 107 (1891).

Civil taxing jurisdiction over non-Indians, on the other hand, was specifically upheld by the Court in *Morris v. Hitchcock, supra*, and other cases. The Court in *Oliphant* made no mention of *Morris v. Hitchcock* or of the other cases supporting tribal civil jurisdiction over non-Indians, such as *Williams v. Lee*, *McClanahan*, and *United States v. Mazurie*. A reading of *Oliphant* that would support the conclusion that this Court overruled these authorities by implication without mentioning them is obviously overbroad.

Even more significant, however, is *Santa Clara Pueblo v. Martinez*, .... U.S. ...., 98 S.Ct. 1670 (May 15, 1978) which was decided by this Court after *Oliphant*. As noted in the previous section, in *Martinez* this Court specifically reaffirmed the *Williams v. Lee* holding that tribal courts have been repeatedly recognized as the appropriate forum for the *exclusive* resolution of disputes affecting important personal and property interests of both Indians and non-Indians. The State's argument that *Oliphant* undermined these authorities by implication is untenable in light of *Martinez*.

In addition to these judicial precedents, the United States government has officially expressed its position that Indian tribes possess such authority in a Solicitor's Opin-

ion[6] and §16 of the Indian Reorganization Act, confirming in the tribes those powers vested by existing law, has been viewed as a confirmation of such power. *See Iron Crow v. Oglala Sioux Tribe*, 231 F.2d at 99.

Finally, it must be emphasized that because of the structure of the tribal cigarette ordinances, it is not necessary for the Tribes to resort to the exercise of any prohibited criminal jurisdiction in order to collect their taxes since the tax is included in the purchase price and is automatically remitted upon the purchase of the taxed goods. Accordingly, there is no need for the Tribe to resort to either criminal or civil jurisdiction in order to enforce the tax.[7]

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6. After §16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476, provided that tribal governments organized pursuant to the Act would have certain enumerated powers *and* those "powers vested in any Indian tribe or tribal council by existing law", the Solicitor for the Department of Interior set forth the position of the United States government as to the existing powers of Indian tribes in this Opinion. The Solicitor observed:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over non-members, so far as such non-members may accept privileges of trade, residence, etc. to which taxes may be attached as conditions.

55 I.D. 14, 46 (1934).

Each of the Tribal constitutions, as approved by the Secretary of the Interior, specifically sets out the authority of the Tribes to tax non-members. *See* Constitution of the Confederated Tribes of the Colville Reservation, Article V, Section 1(E), approved February 26, 1938—Plaintiffs' Exhibit 10.1; Constitution of the Lummi Tribe, Article VI, Section 1(F), approved April 2, 1948—Plaintiffs' Exhibit 10.2; Constitution of the Makah Tribe, Article VI, Section 1(G), approved May 16, 1936—Plaintiffs' Exhibit 10.3.

7. On the other hand, *Williams*, *McClanahan*, *Mazurie* and *Martinez* strongly suggest that a tribe *could* resort to exercise of civil jurisdiction in order to enforce its tax if that became necessary. Similarly, a tribe could presumably bring suit pursuant to 28 U.S.C. §1362 in federal court in order to enforce a tax obligation. However, any questions as to the exercise of such enforcement powers by the Tribes are not presented by the instant case.



**3. No substantial federal question is presented as to whether the State can impose its "excise" tax on Indian-owned vehicles used both on and off the Reservation.**

In its Jurisdictional Statement and in the proceedings below, the State concedes that the legal incidence of Washington's vehicle excise taxes fall upon the owner of the vehicle, in the instant case upon Indians resident on the reservations. The State also concedes that as long as the vehicle is used entirely on the Reservation no tax can be imposed, but argues that as long as the vehicle is used both on and off the Reservation, the question of validity of the tax lies precisely between the holdings of this Court in *McClanahan* and *Mescalero Apache*.

However, as the District Court noted, Washington's excise tax is precisely identical in operation to the Montana property tax invalidated by this Court in *Moe*. Although these taxes are denominated as "excise taxes", each is imposed and assessed annually on a specified percentage of the fair market value of the vehicle for the privilege of using it within the State of Washington. 446 F. Supp. at 1365, Appendix A at 42. A review of the District Court's decision in *Moe* reveals that the vehicle use taxed by the State of Montana, like the use in the instant case, was partly on and partly off the Flathead Reservation. 392 F. Supp. 1325, 1328-29. The issue which the State attempts to raise, therefore, has already been resolved by this Court.

## CONCLUSION

For the reasons stated, those portions of the appeal relating to the State motor vehicle excise taxes and the as-

sumption of jurisdiction over the Makah and Lummi Reservation should be dismissed. The remaining portions of the appeal should be affirmed.

DATED this 30th day of November, 1978.

Respectfully submitted,

ZIONTZ, PIRTLE, MORISSET
ERNSTOFF & CHESTNUT

STEVEN S. ANDERSON
*Counsel for the*
*Confederated Tribes of the*
*Colville Indian Reservation,*
*Lummi Indian Tribe and*
*Makah Indian Tribe, Appellees*

Supreme Court, U. S.
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IN THE

# SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

**No. 78-630**

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,

*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

*Appellees.*

(continued on inside front cover)

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

## BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

SLADE GORTON,
*Attorney General,*
*State of Washington*
RICHARD H. HOLMQUIST,
*Senior Assistant Attorney General*
MATTHEW J. COYLE,
*Assistant Attorney General*
*Attorneys for Appellants.*

Office and Post Office Address:
Temple of Justice
Olympia, Washington 98504
Telephone: (206) 753-5528

STATE PRINTING PLANT OLYMPIA, WASHINGTON

STATE OF WASHINGTON,

*Appellant,*

v.

UNITED STATES OF AMERICA,
and
CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION.

*Appellees.*

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**BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM**

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## I. INTRODUCTION

This brief is in opposition to the several Motions to Dismiss or Affirm filed by respondent Indian tribes,[1] and is submitted pursuant to Rule 16(4) of the Supreme Court Rules.

On the merits, the Tribes' major contention for affirmance is that the analysis and holding of the lower court is correct and therefore the appeal presents no substantial federal question not previously decided by this Court. Motion to Dismiss or Affirm of Confederated Tribes of the Colville Indian Reservation, et al.[2] pp. 9-18; Motion to Affirm of Confederated Bands and Tribes of the Yakima Indian Nation,[3] pp. 11-15.

The Tribes are in error. The analysis and holding of the lower court, with all due respect, are incorrect in that they misapply the "interference with self-government" test established in *Williams v. Lee*, 385 U.S. 217 (1959) and effectively ignore the reasoning and holding of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). Furthermore, even if the lower court's analysis and holding are ultimately determined to be correct, the questions pertaining to, among other things, (1) tribal

[1]The United States, co-appellee in Civil No. 3909 below, apparently has not yet filed a Motion to Dismiss or Affirm. Because no extension of time has been granted the United States subsequent to January 8, 1979, the State assumes the normal timing of distribution of the briefs on file with the Court will be followed and the Court will shortly consider this appeal without regard to the position of the United States. If the United States submits a Motion to Dismiss or Affirm, the State does, of course, reserve the right to submit a reply to this Motion.

[2]Hereafter "Colville Motion".

[3]Hereafter "Yakima Motion".



preemption of a state's taxing power over its non-Indian citizens, and (2) tribal taxing power over non-Indians, have never been decided by this Court and are substantial federal questions involving fundamental relationships among the states, Indian tribes and the federal government.

These questions clearly require full briefing and argument before this Court.

The purpose of this brief is to respond to the Tribes' procedural defenses raised in their motions. Additionally, we call to the Court's attention *The Ute Indian Tribe v. State Tax Commission of the State of Utah*, ..... F.2d ..... (10th Cir., 1978) cert. denied ..... U.S..... (Docket No. 78-292, decided November 13, 1978), a decision directly contrary to the holding of the court below.

## II. ARGUMENT IN ANSWER TO YAKIMA INDIAN NATION'S CONTENTIONS

**The questions presented in the Jurisdictional Statement raise issues of unreasonable burdens on tribal government and the power of the tribe to impose its taxes on non-Indian citizens.**

The Yakima Indian Nation argues[4] that issues pertaining to (1) whether the State's cigarette tax as applied to non-members of the tribe (principally non-Indians) purchasing cigarettes from tribally licensed retailers constitutes an unreasonable burden on tribal self-government, and (2) whether the tribe

[4]Yakima Motion, pp. 11-12.

possesses the power to tax non-Indians on the reservation, are not properly before the Court.

According to the tribe, these issues are not included in the statement of the questions presented in the Jurisdictional Statement, and hence are excluded from this Court's consideration by Rule 15(c) of the Rules of the United States Supreme Court.[5]

The tribe's argument is erroneous. Questions pertaining to unreasonable burden on tribal self-government and tribal taxing power over non-Indians are clearly subsidiary questions fairly comprised within Questions 1-5 as presented in the Jurisdictional Statement. Jur. St., 7-8.

The basic question presented is whether the state may require tribes or their retailers to collect state excise taxes imposed on non-Indian purchasers. This in turn is totally dependent upon whether the state may impose such taxes upon non-Indian purchasers in the first instance.

The touchstone of the three-judge district court's decision was that the state could not impose its excise taxes on non-Indian purchasers because (1) the tax constitutes an unreasonable interference with tribal

[5]Rule 15(c) provides:
"The questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be repetitious. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court."



self-government,[6] and (2) the state's tax has been preempted by a tribal tax.[7]

As shown by the district court's analysis, the question of unreasonable interference with tribal self-government is not only fairly comprised within the questions presented, but also it is absolutely essential to a resolution of those questions. As stated by the court:

> " * * * We hold that as applied to non-Indians as a result of their on-reservation purchases from Dealers, the State's cigarette taxing scheme constitutes an interference with tribal self-government."[8]

[8]App. Jur. St., p. 36.

Thus, this question is before the Court in accordance with Rule 15(c).

Similarly, the question pertaining to tribal taxation of non-Indians is before the Court. A fair reading of the district court's opinion demonstrates that the court's preemption analysis was grounded upon the assumption that both the tribes and the state were taxing the same non-Indian purchasers. For example, the district court found that the tribes were exercising governmental powers delegated under §16 of the Indian Reorganization Act, 25 U.S.C. §476. As stated by the court, "[t]he power to tax both Indians and non-Indians was one of those powers." App. Jur. St. p. 34. Even more clearly, the district court summarized its view of the case as follows:

"In this case, both the State and the Tribes *seek*

[6]App. Jur. St., pp. 37-40.
[7]App. Jur. St., pp. 32-36.

*to tax non-Indians* as a result of their on-reservation transactions with Dealers." (Emphasis supplied) App. Jur. St., p. 37.

The district court's assumption that the tribes were taxing non-Indians (and further, that the tribes *could* tax non-Indians) is clearly a necessary predicate to its conclusion that the tribal tax preempted the state tax. If the tribal tax reached only Indians and the state's tax reached only non-Indians, how could it logically be concluded that tribal taxation preempted state taxation? Simply stated, it would be illogical, and the district court so recognized.

In short, questions pertaining to an alleged unreasonable burden on tribal self-government and tribal taxing powers over non-Indians are fairly comprised within the questions presented in the Jurisdictional Statement. These questions are substantial federal questions of enormous consequences to the citizens of this nation—Indian and non-Indian alike. Therefore, we respectfully urge the Court to disregard the argument of the Yakima Indian Nation pertaining to compliance with Rule 15(c).

## III. ARGUMENT IN ANSWER TO CONTENTIONS OF COLVILLE INDIAN TRIBE, ET AL.

**The appeal of issues pertaining to the imposition of the State's vehicle excise taxes as applied to tribal members residing on the reservation and using such vehicles partly on and partly off the reservation has been timely filed.**

The appellee Colville, Lummi, and Makah Tribes



have moved to dismiss that portion of the State's appeal pertaining to the motor vehicle, travel trailer and camper excise taxing scheme as well as that portion pertaining to the validity of the partial assumption of state civil and criminal jurisdiction over the Makah and Lummi Reservations on the grounds that the State did not file a timely notice of appeal as required by 28 U.S.C. §2101(b).

The procedural events involving the State's notices of appeal are fairly set out in the Colville Motion at pp. 8-9.

Essentially, the question is whether the state's timely Motion for a Partial New Trial, ostensibly addressed only to a portion of the District Court's judgment, nevertheless destroys the finality of all portions of the judgment for purposes of appeal.

If the answer to this question is "yes", the motor vehicle excise tax issues have been timely appealed because these issues were contained in the State's Amended Notice of Appeal in No. 3868 (Jur. St. App., 87-89) filed within 60 days of the filing of the lower court's Order Denying Motion for Partial New Trial. 28 U.S.C. §2101(b).

The general rule is that a judgment is not final, for purposes of computing the time for taking of an appeal, until a motion for a new trial, if entertained by the court, has been disposed of. *United States v. Ellicott*, 223 U.S. 524 (1912); *United States v. Seminole Nation*, 299 U.S. 417 (1937), and cases cited therein. This is because the original judgment ren-

dered is still under the control of the trial court and therefore cannot be deemed a final disposition of the cause until a new trial has been granted or refused. *Kingman & Co. v. Western Mfg. Co.*, 170 U.S. 675 (1898).

Here, the *entire* final judgment of the trial court was still under its control. True, the State indicated in its Motion that the new trial would be limited to the cigarette and sales taxing issues decided by the court. Jur. St. App., 25. But that is just another way of stating that the State's arguments would be directed to modifying that particular portion of the court's judgment dealing with these issues. The trial court still retained the power to amend, modify or vacate its judgment, *qua* judgment, for purposes of altering it as a result of arguments advanced at the new trial.

Additionally, where a partial new trial has been granted pursuant to Rule 59(a) of the Federal Rules of Civil Procedure, those portions of the judgment not re-tried do not become a final judgment. Rather they are merged into and become a part of the judgment entered following retrial. *Weymouth v. Colorado Interstate Gas Co.*, D.C. N.D. Tex., 34 F.R.D. (1963), aff'd. 367 F.2d 84 (5th Cir. 1965).

It would be illogical in the extreme to hold that a portion of a judgment is final for purposes of appeal but not final for purposes of entry after retrial. At best, this would encourage, if not require, piece-



meal appeals of a single action, causing confusion, delay, and expense to the parties and the courts.

For the foregoing reasons, it is clear that the Court should not grant the Tribes' Motion to Dismiss those portions of the appeal pertaining to the motor vehicle excise tax issues. The finality of that portion of the lower court's judgment on these issues has been destroyed by the State's Motion for a Partial New Trial. For purposes of appeal, the entire judgment of the trial court has become merged as of the date of the trial court's denial of that motion. Given that the State filed a timely Notice of Appeal from he denial of that motion raising *all* issues decided by the trial court (Amended Notice of Appeal, Jur. St. App. p. 87), the appeal of the motor vehicle excise tax issues has been timely filed.

## IV. CONCLUSION

For the reasons stated, the State of Washington respectfully requests the Court to deny the Motions to Dismiss or Affirm on file herein, note probable jurisdiction and set this appeal for full briefing and argument.

DATED this 26 day of January, 1979.

Respectfully submitted,

SLADE GORTON,
*Attorney General,*
*State of Washington*
RICHARD H. HOLMQUIST,
*Senior Assistant Attorney General*
MATTHEW J. COYLE,
*Assistant Attorney General*
*Attorneys for Appellants.*

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IN THE

# SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

**No. 78-630**

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,

*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

*Appellees.*

(continued on inside front cover)

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

## APPELLANTS' OPENING BRIEF

SLADE GORTON, *Attorney General,*
*State of Washington*
PHILIP H. AUSTIN,
*Deputy Attorney General*
RICHARD H. HOLMQUIST,
*Senior Assistant Attorney General*
TIMOTHY R. MALONE,
LARRY R. SCHREITER,
MATTHEW J. COYLE,
*Assistant Attorneys General,*

*Attorneys for Appellants.*

Office and Post Office Address: Temple of Justice,
Olympia, Washington 98504. Telephone: (206) 753-5528

STATE PRINTING PLANT OLYMPIA, WASHINGTON

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SLADE GORTON, *Attorney General, State of Washington*

PHILIP H. AUSTIN, *Deputy Attorney General*

RICHARD H. HOLMQUIST, *Senior Assistant Attorney General*

TIMOTHY R. MALONE,
LARRY R. SCHREITER,
MATTHEW J. COYLE,
*Assistant Attorneys General,*

*Attorneys for Appellants.*

Office and Post Office Address: Temple of Justice, Olympia, Washington 98504. Telephone: (206) 753-5528

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S.Rep. 94-204, 94th Cong., 1st Sess. (1975), reprinted in [1976] U.S. Code Cong. & Ad. News, 1988 ..... 45-46
U.S. DEPT. OF INTERIOR, FEDERAL INDIAN LAW (1958) ..... 95
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IN THE

# SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

**No. 78-630**

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,

*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

*Appellees.*

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STATE OF WASHINGTON,

*Appellant,*

v.

UNITED STATES OF AMERICA,
and
CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION,

*Appellees.*

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ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

## APPELLANTS' OPENING BRIEF

## OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1-65) is reported at 446 F.Supp. 1339.

## JURISDICTION

This appeal involves two separate cases from the same court involving identical or closely-related questions.[1] The declaratory judgments and decrees of permanent restraint were filed on May 10, 1978. The State's motions for partial new trials were denied on July 17, 1978 (J.S. App. 77, 79).

In the *Colville* case, on July 12, 1978, the State filed a notice of appeal to the Supreme Court, appealing those portions of the judgment prohibiting (a) application of motor vehicle excise taxes to motor vehicles owned by the Tribes or their reservation resident members and (b) the exercise of civil and criminal jurisdiction under Revised Code of Washington chapter 37.12 against the Lummi and Makah Indian Tribes or their members (A.131). On August 14, 1978, appellants filed a notice of appeal dealing with all the cigarette and sales tax issues decided adversely to the State (A.133). On September 8, 1978, appellants filed an amended notice of appeal adding the motor vehicle excise tax and Public Law 83-280 issues to the other issues raised in the August 14, 1978 notice of appeal (A.135).

In the *Yakima* case, on August 14, 1978, the State

[1]The cases are *Confederated Bands of the Colville Indian Reservation v. State of Washington*, Civ. No. 3868 (E.D. Wash. May 10, 1978) [hereinafter the *Colville* case] and *United States of America and Confederated Bands and Tribes of the Yakima Indian Reservation v. State of Washington*, Civ. No. 3909 (E.D. Wash. May 10, 1978) [hereinafter the *Yakima* case]. The district court consolidated these cases only for purposes of hearing and decision. (Stipulation for Place and Order of Trial). Separate judgments and decrees of permanent restraint were entered by the district court (J.S. App. 66 and 71), and the cases were otherwise treated separately.



filed a notice of appeal dealing with all the cigarette and sales tax issues decided adversely to the State (A.253).

Since these two separate cases from the same district court involve identical or closely related questions, pursuant to Sup. Ct. R. 15(3), a single Jurisdictional Statement covering both cases was filed on October 13, 1978. On February 21, 1979, this Court entered an Order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (A.137, 255).

This being a direct appeal from a three-judge federal district court, jurisdiction of the Supreme Court to review the judgments below is confirmed by 28 U.S.C. §1253. However, this Court having postponed consideration of jurisdiction, the State is conscious of Sup. Ct. R. 16(6) which directs counsel in cases such as this to address themselves to the question of jurisdiction.

Because of the nature of the jurisdictional issues raised in the *Colville* case about the timeliness of the motor vehicle excise tax portion of the appeal (Mot. of Appellee Colville Conf. Tribes * * * to Dismiss or Affirm, pp. 8-9) and in the *Yakima* case about whether a three-judge court should have been convened (U.S. Mot. to Dismiss), the State will address the jurisdiction question at the outset of the Argument portion of this brief (Argument, Parts I & II, *infra*), after having reviewed the facts necessary to resolution of these questions in the Statement of the Case portion of the brief (*infra*, pp. 7-26).

## QUESTIONS PRESENTED

1. Whether a three-judge district court was lawfully convened under 28 U.S.C. §2281 such that this Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1253.

2. Whether the State timely appealed the motor vehicle excise tax issues in the *Colville* case such that this Court has jurisdiction over this portion of the *Colville* appeal.

3. Whether a state may impose upon an Indian Tribe and/or its licensed Indian retailers the obligation to collect state excise taxes on sales of personal property on the reservation to non-Indian purchasers where the legal incidence of the tax falls upon the non-Indian, despite the fact that the Tribe has adopted ordinances taxing these same transactions. This question includes the subordinate questions of whether the state may tax such non-Indian purchasers at all and, if so, whether the state may further require the Indian sellers to collect the tax from their non-Indian purchasers and remit it to the state.

4. Whether a state may impose upon an Indian Tribe and/or its licensed Indian retailers the obligation to collect state excise taxes imposed on their sales of personal property to Indian purchasers other than members of the Tribe occupying the reservation, where the legal incidence of the tax falls upon the Indian purchaser, despite the fact that the Tribe has adopted ordinances taxing these same transactions.

5. Whether a state may impose upon an Indian Tribe and/or its licensed Indian retailers making sales on the reservation to non-Indian purchasers, nondiscriminatory reporting and auditing requirements designed to ensure that taxes collected on sales to non-Indians are properly accounted for.

6. Whether, assuming the state has the authority to require Indian Tribes and/or their licensed retailers to collect and remit taxes on their sales of cigarettes to non-Indians, the state may enforce collection of such taxes by confiscating as contraband those cigarettes within the state which are being shipped in interstate commerce to the Indian Tribe for ultimate resale to non-members of the Tribe.

7. Whether a state may lawfully seize and levy upon property of Indian Tribes to enforce collection responsibility for state taxes imposed against non-Indian purchasers.

8. Whether a state may impose an excise tax on the privilege of using a motor vehicle with respect to motor



vehicles, travel trailers and campers owned by an Indian Tribe or its enrolled members residing upon the reservation, where the motor vehicles are used partly on and partly off the reservation.

9. Whether the State of Washington's assumption of partial territorial jurisdiction over Indian reservations pursuant to RCW chapter 37.12 violates the Equal Protection Clause of the United States Constitution.[2]

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND REGULATIONS INVOLVED

### Federal Constitution.

U.S. CONST., Art. I, §8, cl. 3 (Commerce Clause) (Br. App. 1a)

U.S. CONST., Art. VI, cl. 2 (Supremacy Clause) (Br. App. 1a)

U.S. CONST., Amendment XIV, §1 (Equal Protection Clause) (Br. App. 1a)

### Treaties

Treaty with the Dwamish Etc. Indians (Lummi), Jan. 22, 1855, 12 Stat. 927, Art. II (Br. App. 1a)

Treaty with the Makah Tribe, Jan. 31, 1855, 12 Stat. 939, Art. II (Br. App. 2a)

Treaty with the Yakamas, June 9, 1855, 12 Stat. 951, Art. II (Br. App. 3a)

### Executive Orders

Executive Order of July 2, 1872 (Colville Reservation) (Br. App. 4a)

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[2]This is exactly the same question resolved in favor of the State by this Court in the recent case of *State of Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 99 S. Ct. 740 (No. 77-388, Jan. 16, 1979). As noted in the Jurisdictional Statement at p. 9, the issue is controlled by the Court's decision in *Washington v. Yakima, supra*. Accordingly, no further mention of this issue will be made in this case.

**Federal Statutes and Rules of Court**

Washington Enabling Act, 25 Stat. 676, ch. 180, §4 (1889) (Br. App. 5a)

Public Law 83-280, 67 Stat. 588, ch. 505 (1953) (Br. App. 6a)

Public Law 83-280, 67 Stat. 588, ch. 505, §2 (1953), *as amended*, codified at 18 U.S.C. §1162 (1976) (Br. App. 10a)

Public Law 83-280, 67 Stat. 588, ch. 505, §4 (1953), *as amended*, codified at 28 U.S.C. §1360 (1976) (Br. App. 11a)

Public Law 90-284, Title IV, 82 Stat. 78, codified at 25 U.S.C. §§1321-1326 (1976) (Br. App. 13a)

28 U.S.C. §1253 (1976) (Br. App. 16a)

28 U.S.C. §2101(b) (1976) (Br. App. 17a)

FED. R. CIV. P. 59(a) and (b) (Br. App. 17a)

**State Constitution**

WASH. CONST., Art. XXVI, §2 (Br. App. 18a)

**State Statutes**

RCW 82.08.020, -.030(4), -.050 (retail sales tax) (Br. App. 19a)

RCW 82.12.020 (use tax) (Br. App. 21a)

RCW 82.24.020, -.030, -.040, -.050, -.080, -.130, -.250, -.260 (cigarette tax) (Br. App. 22a)

RCW 82.44.020, -.060, -.110 (motor vehicle excise tax) (Br. App. 27a)

RCW 82.50.400, -.410, -.510, -.540 (taxation of travel trailers and campers) (Br. App. 30a)

RCW 46.16.010 (vehicle licensing) (Br. App. 32a)

**State Administrative Regulations**

WAC 458-20-186 (Rule 186) (Br. App. 34a)

WAC 458-20-192 (Rule 192) (Br. App. 38a)

ETB 504.08.192 (excise tax bulletin) (Br. App. 42a)



## STATEMENT OF THE CASE

The facts essential to a resolution of this appeal are not in serious dispute, and are fairly stated in the district court's opinion (J.S. App. 1-65).[3]

The format of this Statement of the Case will be to review the nature of the proceedings below, set forth the relevant facts, and then describe the action of the district court.

### I. NATURE OF PROCEEDINGS.

In reviewing the proceedings below, the State will include those procedural matters germane to resolution of the jurisdictional questions (Argument, Parts I and II, *infra*, pp. 32-53).

#### A. The Colville Case

The action in the *Colville* case, No. 3868, was commenced on May 17, 1973. The Tribe's complaint sought declaratory and injunctive relief against the application and enforcement of Washington's cigarette excise taxes as applied to sales of cigarettes on the Tribes' reservations, and the seizure as contraband of cigarettes being delivered to the Tribes' reservations (Complaint, ¶6.4, A.11). The Tribes alleged that the application and enforcement of the state's cigarette tax on reservation cigarette sales was prohibited by U.S. Const., Art. I, Sec. 8, cl. 3 (the "Indian Commerce Clause"), the Washington Enabling Act, 25 Stat. 676, ch. 180, §4, and the Indian Trader's Act, 25 U.S.C. §261 (1976), *et seq.* (Complaint, ¶1.7, A.4-7). The Tribes also alleged that seizure as contraband of cigarettes moving in interstate commerce to the Tribes' reservations violated U.S. Const., Art. I, Sec. 8, cl. 3 (the Interstate Commerce Clause) (Complaint, ¶2.3, A.7).

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[3]The facts were established by the stipulation of the parties contained in the pre-trial orders, as supplemented by deposition testimony and uncontroverted affidavits; see, A.28, 125, 168, 219.

The complaint also sought declaratory and injunctive relief against the application of general state civil and criminal jurisdiction over the Colville Tribe and partial state assumption of civil and criminal jurisdiction over the Makah and Lummi Tribes, all of which were assumed pursuant to RCW chapter 37.12.

Because the complaint sought injunctive relief against the enforcement of state statutes, a three-judge district court was convened pursuant to former 28 U.S.C. §§2281 and 2284 (1970) (Certificate Requesting Three-Judge Court; Rec.). However, prior to the actual convening of the three-judge court, the Honorable Charles L. Powell, United States District Judge for the Eastern District of Washington, issued a temporary restraining order on November 5, 1973, restraining the State from enforcing its cigarette and tobacco products taxes against the Tribes (A.13-14). On September 6, 1974, the full three-judge court issued a preliminary injunction enjoining the State from engaging in any action or acting in any manner to enforce its cigarette and tobacco products taxes against the Tribes or their licensed retailers (A.15-16).

Thereafter, the Tribes filed several amended and supplemental complaints, repeating in substance the claims of the original complaint and adding issues pertaining to the imposition of the State's vehicle excise taxes on vehicles owned by members of the Tribes. (*See, e.g.*, Motion for Leave to File Second Amended Complaint, dated February 26, 1976; Rec.)

Subsequent to extensive discovery proceedings and briefing, the parties reached agreement upon a pretrial order (A.28), setting forth the agreed facts and issues to be tried to the court. The trial was held before the three-judge court in Seattle, Washington, on March 28, 1977.

On February 22, 1978, the three-judge district court entered its consolidated decision (J.S. App. 1-65). On May 10, 1978, the court entered a declaratory judgment and decree of permanent restraint (J.S. App. 66). That decree



prohibits the State from, *inter alia*, "Imposing the State of Washington cigarette tax upon non-Indians purchasing cigarettes from any of the Tribes or their licensed dealers on their reservations;" (J.S. App. 69).

On May 19, 1978, the State served a motion for a partial new trial pursuant to FED.R.CIV.P. 59(a) (A.130). This motion was addressed to the issue of the State's power to require non-Indians to pay the cigarette and sales taxes on their purchases from reservation Indians and to require the Indian sellers, in turn, to collect those taxes for the State.

On July 12, 1978, the State filed a notice of appeal to the Supreme Court of the United States, appealing from that portion of the judgment prohibiting the application of motor vehicle excise taxes on motor vehicles owned by the Tribes or their reservation resident members and prohibiting the exercise of civil and criminal jurisdiction under RCW chapter 37.12 against the Lummi and Makah Indian Tribes or their members (A.131).

On July 17, 1978, the three-judge district court entered an order denying the State's motion for partial new trial (J.S. App. 77).

On August 14, 1978, the State filed a notice of appeal dealing with all the cigarette and sales tax issues decided adversely to the State by the three-judge court (A.133).

On September 8, 1978, the State filed an amended notice of appeal adding the motor vehicle excise tax and Public Law 83-280 issues decided adversely to the State to the cigarette and sales tax issues contained in the notice of appeal filed on August 14, 1978 (A.135).

The Jurisdictional Statement was filed on October 13, 1978. On February 21, 1979, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing on the merits (A.137).

### B. The Yakima Case.

The action in the *Yakima* case, No. 3909, was commenced on July 18, 1973, by the United States on behalf of the Yakima Indian Nation (A.138). The

complaint sought declaratory and injunctive relief against the enforcement of state cigarette taxes on cigarette sales by the Yakima Indian Nation, including the seizure of cigarettes from interstate common carriers bound for the Yakima Indian Reservation (Complaint, Prayer, ¶d, A.143). The United States alleged that such actions: (1) were an unconstitutional interference with Indian commerce and the internal affairs of the Tribe, (2) violated the terms of the Yakima Treaty, 12 Stat. 951, and the Washington Enabling Act, 25 Stat. 676, and (3) deprived the Tribe of property without due process of law (Complaint, ¶11, A.141-142).

On July 19, 1973, the United States requested the convening of a three-judge court because the complaint sought injunctive relief against the enforcement of state statutes on the grounds of unconstitutionality of such statutes (A.145). On July 20, 1973, District Judge Powell certified the necessity for a three-judge court because the complaint sought injunctive relief against enforcement of state statutes on the grounds of unconstitutional interference with interstate commerce and deprivation of property without due process of law (A.146).

Prior to the convening of the three-judge court, Judge Powell, on November 5, 1973, issued a temporary restraining order restraining the State from enforcing its cigarette and tobacco products taxes against the Tribe and its licensed retailers (A.147).

On April 24, 1974, the Yakima Indian Nation intervened as a plaintiff, making in substance the same allegations as made by the United States and seeking, in addition to injunctive relief, damages for interference with the Tribe's cigarette business (A.149-155).

Thereafter, the history of the *Yakima* case largely paralleled the history of the *Colville* case. On September 6, 1974, the full three-judge court issued a preliminary injunction enjoining the State from enforcing its cigarette and tobacco products taxes against the Tribe and its licensed retailers with respect to cigarettes or tobacco



products being shipped to the Tribe in interstate commerce (A.156). On October 4, 1974, the United States filed an amended complaint, expanding the scope of the complaint to include licensed retailers of the Tribe (Amended Complaint, ¶13, A.158, 161-162).

Subsequent to extensive discovery proceedings and briefing, the parties reached agreement upon a pretrial order (A.168-218), setting forth the agreed facts and issues to be tried to the court. The trial was held before the three-judge court in Seattle, Washington, on March 28, 1977.

On February 22, 1978, the court entered its consolidated decision (J.S. App. 1-65). On May 10, 1978, the court entered its declaratory judgment and decree of permanent restraint (J.S. App. 71). The decree parallels that in *Colville*. Thus, it prohibits the State from, *inter alia*, "Imposing the State of Washington cigarette and sales taxes upon non-Indians purchasing cigarettes from the Yakima Nation and its licensed dealers on the Yakima Indian reservation;" (J.S. App. 73).

On May 19, 1978, the State served a motion for a partial new trial pursuant to FED.R.CIV.P. 59(a) (A.252); see, note 37, *infra*. As in *Colville*, this motion was addressed to the issue of the State's power to require non-Indians to pay the cigarette and sales taxes on their purchases from reservation Indians and to require the Indian sellers, in turn, to collect those taxes for the State.

On July 17, 1978, the court entered an order denying the State's motion (J.S. App. 79).

On August 14, 1978, the State filed a notice of appeal dealing with all the cigarette and sales tax issues decided adversely to the State by the three-judge court (A.253). On October 13, 1978, the State filed its Jurisdictional Statement.

On February 21, 1979, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing on the merits (A.255).

## II. THE RELEVANT FACTS.

### A. THE TRIBES AND RESERVATIONS.

1. **Colville, Lummi and Makah.** The Colville Tribe is an Indian tribe with a governing body, recognized by the United States (A.31). The Tribe has approximately 5,837 members (A.31), of which approximately 3,200 reside on the reservation (A.43). The total population of the Colville Indian Reservation is 7,027 (A.43). The Colville Indian Reservation encompasses 1.3 million acres (A.31) and is located entirely within the State of Washington (A.32). The reservation has in excess of 5,000 miles of roads of all types, including state public highways (A.42-43). The reservation was created by executive order in 1872. *See* Executive Order of July 2, 1872, 1 C. Kappler, INDIAN AFFAIRS, LAWS AND TREATIES 916 (1903) (Br. App. 4a).

The Lummi Indian Tribe is an Indian tribe with a governing body, recognized by the United States (A.32). The Tribe has approximately 2,000 enrolled members, of which approximately 1,250 reside on the Lummi Indian Reservation (A.32, 43). The Lummi Indian Reservation is located in northwestern Washington, and encompasses 7,319 acres (A.32). The reservation was created pursuant to the Treaty with the Dwamish Etc. Indians (Treaty of Point Elliott), 12 Stat. 927 (1855) (Br. App. 1a).

The Makah Indian Tribe is an Indian tribe with a governing body, recognized by the United States (A.32). The Tribe has approximately 1,000 members (A.32) of which approximately 900 reside on the reservation (A.44). The Makah Indian Reservation is located in Washington, and encompasses approximately 28,000 acres (A.32). The Makah Reservation was established pursuant to the Treaty With the Makah Tribe, 12 Stat. 939 (1855) (Br. App. 2a).

2. **Yakima.** The Confederated Bands and Tribes of the Yakima Indian Nation is an Indian tribe with a governing body, recognized by the United States (A.171).



The Tribe has a membership of over 6,000, of which approximately 5,000 live on the Yakima Indian Reservation (A.172). Approximately 1,500 Indians of other tribes and bands also reside on the reservation (A.172). Indians comprise approximately 25 percent of the population residing on the reservation (A.172). The Yakima Indian Reservation was reserved for the Tribe pursuant to the Treaty with the Yakamas, 12 Stat. 951 (Br. App. 3a). The reservation, located in eastern Washington, has approximately 1,387,505 acres within its exterior boundaries, of which all but approximately 270,895 acres are held in trust or restricted status by the United States as trustee for the Tribe, its members or other Indians. These 270,895 acres are owned in fee simple primarily by non-Indians (A.172).

### B. TRIBAL TAXING SCHEMES.

1. **Colville, Lummi and Makah Tribes.** The tribal taxing schemes of the Colville, Lummi and Makah Tribes are virtually identical. Each tribe has enacted a tobacco ordinance regulating the sale, distribution and taxation of cigarettes on its reservation.[4] Pursuant to its ordinance, each Tribe has established one or more tribal tobacco outlets on "trust land" on its reservation under the control and jurisdiction of both tribal and federal regulations (A.32-34). All cigarettes purchased by the Tribes are paid for with federally-restricted tribal funds from an individual Indian money account in the Bureau of Indian Affairs agency serving the reservation pursuant to 25 C.F.R. Part 104 (1978), entitled "Individual Indian Money Accounts" (A.32-34).

All cigarettes are purchased from authorized wholesalers outside the State of Washington, and are shipped in sealed and licensed trucks of interstate commerce carriers directly to the respective reservations. There, distribution is made to the tribal tobacco outlets and tribal cigarette taxes fixed by the tribal or business council are collected.

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[4] *See* Colville Ordinance, A.104; Lummi Ordinance, A.118; and Makah Ordinance, A.111.

The tribal cigarette tax amounts are as follows:

| Indian Tribe | Cigarette Tax |
|---|---|
| Colville Indian | $.04 per package |
| Lummi Indian | $.05 per package |
| Makah Indian | $.05 per package |

The tribal tobacco ordinances provide that the cigarette tax imposed by the tribes is a tax upon distribution of cigarettes on the reservation by the respective tribes through tribal tobacco outlets (A.32-34). The ordinances also provide that the tax shall be "added to the retail price" and accordingly be paid by the retail purchaser.[5] The district court thus correctly viewed the incidence of the tax as being on the non-Indian purchaser.

The entire stock of cigarettes distributed by the plaintiff Tribes pursuant to their tobacco ordinances remain tribal property, owned and possessed by the respective Tribes until sale to the ultimate consumer. Payment to the respective Tribes of the wholesale distribution price provided in the ordinances by the operators of tribal tobacco outlets entitle the operators to custody of distributed cigarettes until sale to the ultimate consumer (A.32-34).

The operator of each tribal tobacco outlet is licensed by the respective Tribe and manages the tribally-owned tobacco business in the outlet as a tribal employee. Simultaneously, the operator of each tribal tobacco outlet except the Makah Resort manages his own business, selling a variety of merchandise at retail, including Indian jewelry, baskets, other Indian art, soft drinks and sundries. Business enterprises of the operators of tribal tobacco outlets other than the tobacco business are owned by the operators themselves (A.32-34).

The Colville and Lummi Tribes furnish the operators of their tribal tobacco outlets only with cigarettes and tobacco products pursuant to their tribal ordinances. The

[5]*See* Colville Ord., §8, A.107; Lummi Ord., §8, A.121; Makah Ord., §8, A.114.



operators themselves are required to furnish working capital and pay all business expenses. As remuneration for managing a tribal tobacco outlet, each operator is entitled to retain the gross revenue derived from sale of cigarettes and tobacco products in excess of the wholesale distribution price and excise tax levied by the respective Tribes (A.32-34).

The operator of each tribal outlet is a federally-licensed Indian trader.[6] In addition, the wholesaler of cigarettes purchased by the three Tribes, located in Portland, Oregon, is also a federally-licensed Indian trader (Pre-trial ¶2.6, A.34).

2. **Yakima Tribe.** The Yakima Tribe's business and cigarette taxing scheme is significantly different from the Colville, Lummi and Makah scheme. Instead of acting as a "retailer", the Yakima Tribe occupies the position of a wholesaler, wholesaling cigarettes to licensed retailers of the Tribe for resale at retail to members and non-members of the Tribe at locations on the reservation (A.172).

The Tribe imposes a tax of 22.5 cents per carton on each carton sold by its licensed retailers (A.177). This tax is designated in the Tribal Ordinance as a "permit fee", is to be paid by the retailer, and is not required to be added to the retail price (A.204-207). Thus, in contrast with the tribal taxes in *Colville*, the incidence of the tax in *Yakima* is clearly upon the licensed Indian retailer.

In addition, the Tribe obtains revenue by a "mark up" of one cent per carton sold to licensed Indian retailers. During 1975, the total revenue to the Tribe from its tax and wholesaling enterprise was $278,408.24. The retailer realizes a gross profit of 65¢ per carton (A.177).

The Tribal enterprise, licensing, and taxation scheme with respect to cigarettes is conducted as follows:

[6]This does not apply, however, to "full-blood" members of the respective Tribes. Apparently, the Secretary of the Interior is of the view that the Indian Traders Act, 25 U.S.C. §261, *et seq.*, does not require the licensing of "full-blood" tribal members. *See* Exhibit D to Affidavit of Barry D. Ernstoff in Support of Motion for a Preliminary Injunction, filed September 18, 1973 in Cause No. 3868.

cigarettes and tobacco products are purchased by the Tribe from out-of-state wholesalers and shipped directly to the Tribe by licensed, bonded interstate common carriers. Physical possession of these products is taken at the tobacco warehouse of the Tribe at Wapato, Washington, on the reservation. These products are in turn resold and delivered to the individually-owned smoke shop by tribally-owned vehicles. These products are then resold at retail to members and non-members of the Tribe (A.172-175).

All persons licensed by the Tribe to sell cigarettes and tobacco products at retail within the exterior boundaries of the Yakima Indian Reservation are enrolled members of the Tribe. The land upon which these licensed Indian retailers conduct their retail business is allotted land held in trust by the United States for individual Indians or by restricted deed to individual Indians (A.172-175).

The Tribal cigarette business is financed entirely by the Tribe and the retail cigarette businesses are financed entirely by the licensed Indian retailers. Some of the retailers obtain their financing from the tribal loan program. The retailers' places of business are accessible by public roads and highways and are located in areas of the reservation open to the general public (A.176).

A majority of the cigarettes and tobacco products sold by the licensed Indian retailers are purchased by persons who are not members of the Tribe. No precise figures are available to measure the exact percentage of cigarettes purchased by members of the Tribe (A.176-177).

The funds received by the Tribe from its cigarette tax, plus profits from its cigarette wholesaling enterprise are available for expenditure by the Tribe in support of its governmental functions (A.177).

### C. THE STATE'S CIGARETTE AND SALES TAXING SCHEME.

1. **State Cigarette Excise Tax.** The State of Washington imposes a cigarette excise tax in the amount



of $1.60 per carton.[7] The tax is imposed pursuant to RCW 82.24.020 (Br. App. 22a) upon the sale, use, consumption, handling, possession or distribution of cigarettes. The tax is collected by means of tax stamps affixed to individual packages of cigarettes. Retailers are required to either purchase pre-stamped cigarettes from wholesalers or purchase a supply of stamps from the State which are to be affixed to the cigarettes by the retailer prior to sale. RCW 82.24.030, -.040, -.050 (*see* A.186). In the event the retailer affixes stamps himself, he will be entitled to compensation at the rate of $1.85 per thousand packs of cigarettes. RCW 82.24.070 (*Id.*).

The Tribe and its licensed Indian retailers may possess unstamped cigarettes for purposes of resale to members of the Tribe. RCW 82.24.260 (Br. App. 26a). However, the statute requires licensed Indian retailers of the Tribe to collect cigarette excise taxes with respect to sales to non-members of the Tribe and remit the tax to the State. *See* WAC 458-20-192 (Br. App. 38a). This collection responsibility is accomplished by requiring reservation retailers to affix state tax stamps and collect and remit the cigarette excise tax to the State at the time of retail sale to non-Indian consumers. *See* ETB 504.08.192 (Br. App. 42a).

If the Indian seller, however, does not collect the tax from the non-Indian purchaser, the State may collect the tax directly from that purchaser; *see* RCW 82.24.020 and -.080. Further, that purchaser may be subject to criminal penalties; *see* RCW 82.24.110(4) and (5). And the cigarettes themselves may be seized as contraband; *see* RCW 82.24.130.

State statutes provide that unstamped cigarettes found within the state are to be declared contraband and subject to summary seizure and sale. RCW 82.24.130 (Br.

[7]The tax is imposed by three separate statutes. RCW 84.24.020 imposes a tax of 6.5 mills per cigarette; RCW 28A.47.440 imposes a tax of .5 mills per cigarette; and RCW 73.32.130 imposes a tax of 1 mill per cigarette. Thus, the total tax is .8 cents per cigarette or $1.60 per carton (200 cigarettes).

App. 24a). In the case of cigarettes being transported in interstate commerce into the State of Washington, this contraband requirement is not applicable where the cigarettes are consigned to a licensed wholesaler or retailer, the United States or any agency thereof, and any Indian tribal organization authorized to possess unstamped cigarettes. RCW 82.24.260 (Br. App. 26a). An Indian tribe is not "authorized" to possess unstamped cigarettes where "* * * it appears that sales of unstamped cigarettes to persons who are not enrolled members of a recognized Indian tribe are taking place, or have taken place, within the exterior boundaries of the reservation occupied by that tribe." RCW 82.24.040 (Br. App. 23a). Here, none of the Tribes are "authorized" to possess unstamped cigarettes because it is clear that sales to non-members of the Tribe have taken place.

Prior to the inception of this litigation, the State declared and seized as contraband unstamped cigarettes in the stream of interstate commerce bound for the Tribes' reservations (Colville Complaint, A.18-19; Pre-Trial Order, A.34-35). The State, unless restrained, will continue such seizures of unstamped cigarettes shipped from outside the State of Washington and destined for Indian reservations in the future (Pre-Trial Order, ¶2.10, A.35).[8]

2. **State Sales Tax.** The State also imposes a sales tax on the sale of tangible personal property and certain services at retail. RCW 82.08.020.[9] The sales tax is imposed upon the purchaser, and the retailer is required to collect the tax and remit it to the State. RCW 82.08.050[10]

[8]Prior to the inception of the *Yakima* litigation, the State assessed cigarette taxes directly against the Tribe, and attempted to collect these taxes by a summary distraint procedure authorized pursuant to RCW 82.32.235. (U.S. Complaint, ¶¶8-11, A.140-142). The State no longer contends that it may lawfully assess taxes against the Tribe and its wholesaling function because no tax liability arises until cigarettes are resold by tribally-licensed retailers to non-Indians. *See* A.187.

[9]Br. App. 19a.

[10]Br. App. 19a.



During the time relevant to this litigation, the sales tax rate (combined state-local) was 5 percent of the retail selling price.[11] It is undisputed that the legal incidence of the sales tax falls upon the purchaser, and that the sales tax applies to sales of cigarettes. The sales tax does not apply to sales to reservation Indians where delivery takes place upon the reservation. WAC 458-20-192.[12]

### D. THE ECONOMIC EFFECT OF THE STATE TAXES UPON THE INDIAN SMOKE SHOPS.

On the Yakima reservation, there are seventeen Indian smoke shops (Pre-trial Order, ¶5.7, A.172-175). On the Colville reservation, there are fourteen (Pre-trial Order, ¶2.11, A.35-36). On the Lummi reservation, there are six (Pre-trial Order, ¶2.15, A.38). And on the Makah reservation, there is only one (Pre-trial Order, ¶2.18, A.39-40). The majority of the customers at these smoke shops are non-Indians (A.46, 176-177).

To keep their non-Indian clientele, the smoke shops need a competitive advantage over the non-Indian sellers of cigarettes. And that competitive advantage stems from the non-Indian customers' being able to purchase their cigarettes free from the state cigarette and sales tax.

All the plaintiff Tribes presented undisputed testimony to this effect. Thus, Dr. Herrmann, the economic expert for the Yakima Tribe, testified as follows with respect to the smoke shops on the Yakima Reservation:

> "I was quite interested in the demand elasticity situation when I was interviewing those smoke shops. And at the Triangle Smoke Shop I asked, 'Why did you charge $3.80 for a carton of cigarettes,' which was on that particular day of my visit for a particular carton that I was examining, a particular brand and so on — was the price. And I said, 'Why don't you raise the price? If it's $5. at Safeway in Yakima, why do you only charge $3.80.'

[11]RCW 82.08.020 (4.5% state tax rate); RCW 82.14.030 (.5% local sales tax rate).

[12]Br. App. 38a.

"And the response struck me as being very reasonable. There has to be a price incentive to offset the expense of driving from Yakima out to the reservation, plus the time of the individual that's involved. So that at $3.80 the average sale, I was told, tended to be between two cartons and four cartons at the Triangle Smoke Shop. There is just enough incentive for people to drive out from Yakima to buy cigarettes there. And that really was an explanation that the operator of the smoke shop felt made sense for that operation, and that it was market competitive to be offering those cigarettes at that price.

"Now by the time I got clear over to visit with Holt-Brewer on the eastern side of the reservation I found another kind of demand elasticity problem. His customers drive from the Tri-Cities, which is some 40 miles southeast of his smoke shop. And so, he simply isn't able to charge $3.80 a carton. And he told me that his average carton of cigarettes goes at $3.60 a carton.

"But more than that, the people in the Tri-Cities will go together. And so you'll have, if you will, pooled purchases. In other words, there would be four or five neighbors or friends and they'll all place their order. And then a single automobile will make that drive. And so the average size of sale, therefore, will also be larger. Holt-Brewer would sell six cartons, ten cartons or even more than ten cartons." (Deposition of Cyril C. Herrmann, *Yakima* case, pp. 23-24, A.234)

Dr. Herrmann later testified that in fact the average sale at the Holt-Brewer smoke shop was *twenty cartons of cigarettes.* (Herrmann Deposition, p. 47, A.250)

Dr. Herrmann described the potential impact on the smoke shops which would stem from imposition of the state taxes on their customers as follows:

"A. * * * [I]t would be a completely irrational act for a non-Indian buyer who can buy cigarettes at $5 a carton at Safeway in Yakima to drive all the way out to the reservation and then be asked to pay a higher price.

"I've testified earlier that the Indians require a lower price in order to offset the disadvantage they have of being remote from markets.



"So in order to get those automobiles that drive down Highway 97 to stop, there has to be a price incentive sufficient to offset the cost and the time inconvenience of driving out there to buy cigarettes.

"So that for them $3.80 per carton is very competitive with $5 at Safeway in Yakima.

"Q. In effect then the only way to attract these non-Indian customers to the reservation is to exempt the tribe from the duty of collecting the State tax?

"A. Well, that's one workable mechanism. That's the mechanism that's working at the present time.

"They need a lower price." (Herrmann Dep., pp. 46-47, A.249-250).

The locational disadvantages of the smoke shops, in short, must be overcome through the tax immunity of their non-Indian customers. Without the competitive advantage stemming from that tax immunity, the smoke shops would lose those customers, and be selling only to Indians.

### E. THE STATE MOTOR VEHICLE EXCISE TAXING SCHEME.

The Colville, Lummi and Makah Reservations are each relatively remote, isolated and undeveloped. Most essential goods and services needed by Tribal members are located off the reservation and can only be reached by private automobile (Pre-trial Order, ¶¶2.25, 2.26, and 2.28, A.42-43, 44). Most Indian households on the reservations own at least one automobile and many households own two (*Id.*). The Tribes themselves own and operate numerous vehicles used in the furtherance of Tribal business (Pre-trial Order, ¶¶2.25, 2.26, A.42-43). The Colville Reservation has in excess of 5,000 miles of roads of all types, including state public highways (Pre-trial Order, ¶2.25, A.42-43). The Lummi Reservation has 40 miles of roads of all types, including county roads (Pre-trial Order, ¶2.26, A.43). The Makah Indian Reserva-

tion has 64 miles of roads of various types, but has no state highways or county roads (Pre-trial Order, ¶2.28, A.44). The roads on the Makah Reservation are built and maintained by the Bureau of Indian Affairs (Pre-trial Order, ¶2.23, A.42).

The State's motor vehicle excise tax is imposed pursuant to RCW 82.44.020.[13] It is an excise tax imposed upon the privilege of using a motor vehicle within the state. RCW 82.44.020. During the time relevant to this litigation, the annual amount of the tax was 2 percent of the fair market value of the motor vehicle. RCW 82.44.020.[14] The camper and travel trailer excise taxes are imposed pursuant to RCW chapter 82.50.[15] The camper and travel trailer excise tax is an annual excise tax imposed for the privilege of using campers and trailers in the State of Washington. RCW 82.50.400.[16] The tax is levied at an annual rate of 1 percent of the fair market value of the vehicle. RCW 82.50.410.[17] When the tax is paid, a license is issued entitling the camper or trailer to the use of the State's public highways. RCW 82.50.540.[18]

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[13]Br. App. 27a.

[14]Beginning on August 1, 1978, the rate was increased to 2.2 percent. Wash. Laws of 1977, 1st ex. sess., chapter 332, section 1.

[15]Br. App. 30a. At the inception of this litigation, RCW chapter 82.50 also imposed an excise tax upon "mobile homes". The State originally claimed the power to impose its vehicle excise tax upon mobile homes owned by reservation Indians. However, since mobile homes are, by their nature, intended to be used entirely within an Indian reservation, the State no longer claims that it may apply its vehicle excise tax to mobile homes owned by a Tribe or its reservation resident members so long as the mobile home is used entirely within reservation boundaries. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

[16]Br. App. 30a.

[17]Br. App. 31a.

[18]Br. App. 32a.



## III. ACTION OF THE THREE-JUDGE DISTRICT COURT.

The three-judge district court began by finding jurisdiction over the parties and subject matter of the action. Recognizing that Indian tax exemptions normally raise questions only under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, the court nevertheless found that the Tribes' claims for relief raised a substantial federal question under the Commerce Clause (J.S. App. 14). This Commerce Clause claim was based upon the State's seizure as contraband of unstamped cigarettes moving in interstate commerce to the Tribes (*Colville* Pre-trial Order, ¶¶2.7-2.10, A.34-35; *Yakima* Pre-trial Order, ¶5.15, A.182-183).

On the merits, the court began by analyzing the state cigarette taxing scheme as applied to sales by reservation Indians to non-Indians. The court found that the legal incidence of the State's cigarette and sales taxes fell upon the non-Indian purchaser (J.S. App. 17-24). Thus, Washington's cigarette and sales taxing scheme was similar to Montana's cigarette taxing scheme at issue in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), *i.e.*, a tax imposed upon the purchaser to be collected by the seller.

The court next disposed of the Tribes' contentions that the State's cigarette taxing scheme had been preempted by federal legislation and policy underlying the Indian Traders Act, 25 U.S.C. §261 (1976), *et seq.*; the Indian Reorganization Act of 1934, 25 U.S.C. §476 (1976), *et seq.*; the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450 (1976); and the Indian Financing Act of 1974, 25 U.S.C. §1451 (1976), *et seq.* The court found nothing in these acts which attempted to implement a federal policy by regulating a subject matter closely related to that touched on by the State's cigarette tax (J.S. App. 31-32).

The court disposed of the Tribes' claims that imposition of the State's cigarette tax on non-Indian

purchasers constitutes a "multiple burden" on Indian commerce. Relying upon *Moe, supra,* and *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973), the court held that there is no "automatic exemption" from state taxation on Indian reservations under the Commerce Clause (J.S. App. 24-25). Similarly, in response to the Tribes' claim that imposition of the State's cigarette tax collection requirement violated due process of law, the court held that *Moe, supra,* foreclosed any such argument (J.S. App. 26).

The court then switched its focus from the validity of the collection requirement to the validity of the tax itself. And it held that the very imposition of the cigarette and sales taxes — and not just the collection requirement — was invalid. This holding was based upon two alternative theories. Under its first theory, the state taxes on purchases of cigarettes by non-Indians had been pre-empted by the passage of Tribal ordinances regulating and taxing the sale of those same cigarettes. Under the court's second theory, the imposition of the state taxes, on top of the Tribal taxes, interfered with the right of Indian self-government, as articulated in *Williams v. Lee,* 358 U.S. 217 (1959).

In the *Yakima* case, No. 3909, the court found that the state cigarette tax, as applied to non-Indians purchasing cigarettes from tribal retailers, was invalid for the same reasons discussed in the *Colville* case. The court found that the state sales tax, as applied to the sales of cigarettes, was preempted by the Tribe's cigarette taxing ordinance (J.S. App. 52-54). However, the court held that in the absence of a Tribal tax on sales of articles other than cigarettes, the State's sales tax was not preempted, and Indian retailers could be required to collect and remit the tax to the State (J.S. App. 54-55).

In addition to the issues surrounding state taxing power over non-Indians on Indian reservations, the court also ruled on one "enforcement issue" presented to it. That issue deals with the power of the State to impose



record keeping requirements upon Indian retailers reasonably necessary to ensure payment of taxes collected from non-Indians. The court held that state record keeping requirements set forth in ETB 504.08.291,[19] requiring Indian retailers to keep records of sales to Indians, were preempted by the Indian Traders Act, 25 U.S.C. §261 (1976), *et seq.* (J.S. App. 30). In the *Yakima* case, the court also held that the State could not impose a requirement that Indian retailers keep records of nontaxable sales of items other than cigarettes.[20] (J.S. App. 57-58). However, the court held that the State could require Indian retailers to keep records of taxable transactions, *i.e.*, sales to non-Indians. (J.S. App. 56-57).

Finally, the court held that the State could not impose its motor vehicle, travel trailer and camper excise taxes upon vehicles owned by the Tribes and their reservation resident members when such vehicles were driven partly on and partly off the reservation. The court found that Washington's vehicle excise taxes were no different in practical operation and effect from Montana's personal property tax on automobiles invalidated by this court in *Moe, supra* (J.S. App. 42). Judge Kilkenny, again in dissent, reached no conclusion as to the validity of the State's vehicle excise taxes. In his view the record was inadequate to rule on a tax falling between the on-reservation activities considered in *McClanahan, supra,* and the off-reservation activity considered in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973).

In conformity with its opinion, the court subsequently issued separate declaratory judgments and decrees of permanent restraint. In the *Colville* case, No. 3868, the State was enjoined from imposing the cigarette tax upon non-Indians purchasing cigarettes from the Tribes or their licensed dealers; from requiring that sales to both Indians

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[19]Br. App. 42a.

[20]The basis of the court's ruling on this issue is not clear. Presumably, the court felt that the record keeping requirement was not "reasonable" and hence an interference with tribal self-government.

and non-Indians be reported; from acting in any manner to enforce the cigarette tax by confiscation or seizure of cigarettes owned, possessed or sold by the Tribes or their licensed dealers; from imposing the motor vehicle excise tax and the mobile home, travel trailer and campers excise tax upon the Tribes or their reservation resident members with respect to motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on the reservation.[21] (J.S. App. 69).

In the *Yakima* case, No. 3909, the court enjoined the State from imposing its cigarette and sales taxes upon non-Indians purchasing cigarettes from tribally-licensed dealers; from requiring that cigarette sales to Indians and non-Indians be reported to the State; and from acting in any manner to enforce taxes by seizing or confiscating cigarettes owned, possessed or sold by the Yakima Nation and its licensed dealers (J.S. App. 73-74).

This appeal followed.

## SUMMARY OF ARGUMENT

Only three years ago, in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), this Court held that the State of Montana could require operators of Indian tribal "smoke shops" to collect state excise taxes imposed on their non-Indian customers. The Court thus refused to sanction — because it was without foundation in federal law — an attempt by Indian Tribes to market to

[21]The court also enjoined the State from imposing its tobacco products tax (chapter 82.26 RCW) upon the Tribes or their licensed dealers, and imposing the Washington sales/use tax upon any of the Tribes or their reservation resident members with respect to mobile homes delivered to and located inside the exterior boundaries of the reservation. Neither of these two injunctive orders has been appealed. Unlike the cigarette tax, the legal incidence of the State's tobacco products tax falls upon the retailer. Under *McClanahan, supra*, the State is thus prohibited from imposing this tax. Similarly, the legal incidence of the State's sales/use tax falls upon the purchaser. To the extent that mobile homes are delivered to reservation resident members and are used exclusively on the reservation, no sales/use tax liability will arise. *McClanahan, supra.*



non-Indians a tribal immunity from state taxation.

These appeals from two separate three-judge district court decisions involve an identical attempt to market to non-Indians a tribal immunity from state taxation. The Tribes involved in this latest attempt were successful in convincing the district court majority that they had a right to immunize non-Indians from state taxation by the simple expedient of taxing this cigarette trade themselves. The central issue in these appeals, therefore, is whether Indian Tribes have such a right to market tribal tax immunities to non-Indians.

These appeals present two distinct jurisdictional questions and several distinct substantive questions. Because this Court has postponed jurisdiction to the hearing on the merits, we address these jurisdictional questions at the outset.

### A. JURISDICTIONAL ISSUES.

1. This Court has jurisdiction of these appeals pursuant to 28 U.S.C. §1253 (1976) because a three-judge court properly convened pursuant to the former 28 U.S.C. §2281 (1970). A three-judge court is not required where the claim is "insubstantial" (*Goosby v. Osser*, 409 U.S. 512 (1973)), or presents only Supremacy Clause questions (*Swift & Co. v. Wickham*, 382 U.S. 111 (1965)). Although it is now clear that the question of on-reservation application and enforcement of state taxes on non-Indians presents only Supremacy Clause questions, at the time the three-judge district court was convened it appeared that substantial Commerce Clause issues were involved. It was not until this Court's decision in *Moe, supra*, that it became apparent that these Commerce Clause issues were insubstantial. More importantly, the United States and the Tribes in both the complaints and pre-trial orders sought injunctive relief against the enforcement of *state statutes* authorizing seizure as contraband of unstamped cigarettes moving in interstate commerce to the Tribes' reservations. This claim raises substantial Commerce Clause questions, thus requiring the convening of a

three-judge court in order to grant the requested relief. Accordingly, this case is properly before the Court on direct appeal.

2. This Court has jurisdiction of the motor vehicle excise tax issue involved in the *Colville* case. 28 U.S.C. §2101(b) (1976) requires that a notice of appeal be filed within sixty days of the entry of final judgment. Subsequent to the entry of the original judgment in *Colville*, the State made a timely Rule 59 motion for a partial new trial, directed to the cigarette and sales tax issue, but not to the motor vehicle excise tax issue. Sixty-eight days after entry of the original judgment, the district court denied the State's motion. The State subsequently filed a notice of appeal with respect to all substantive issues. A judgment is not final for purposes of computing the time for taking of an appeal until a motion for a new trial has been disposed of. *United States v. Ellicott*, 223 U.S. 524 (1912). The district court's original judgment — including that portion dealing with the motor vehicle excise tax issues — did not become final so long as the State's Rule 59 motion awaited decision. *See Weymouth v. Colorado Interstate Gas Co.*, 34 F.R.D. 4 (N.D. Tex. 1963), *aff'd*, 367 F.2d 84 (5th Cir. 1965). To hold otherwise would encourage piecemeal appeals of a single action, causing confusion, delay, and expense to the parties and the courts.

B. **SUBSTANTIVE TAX ISSUES.**

1. The major issue in these appeals is whether an Indian Tribe may oust the State of power to tax its non-Indian citizens purchasing cigarettes from Tribal retailers. The district court held that Tribal taxation of cigarette sales to non-Indians preempted a state tax imposed on non-Indian purchasers of cigarettes. Thus, the court not only deprived the State of the power to require Indian sellers to collect state cigarette taxes; it also deprived the power of the State to impose those taxes at all — a power which this Court in *Moe* characterized as "concededly lawful". *Moe, supra*, 425 U.S. at 483.



Although the court purported to rely upon two alternative theories for its holding, one based upon a concept of federal preemption and the other based upon a concept of tribal self-government, the application of both concepts was bottomed upon a simple economic fact. The imposition of the state excise taxes upon the non-Indian purchasers would remove the competitive advantage enjoyed by the Indian smoke shops and would thus severely diminish the revenue from the tribal tax imposed upon these cigarette sales ot non-Indians. To preserve this source of Tribal tax revenue, the court was required to strike down the State's tax. The court thus conferred upon the Tribes the power to bestow a tax immunity upon their non-Indian customers and in effect to market that immunity to them in return for their cigarette business. There is nothing in federal law which requires such an immunity for non-Indians.

First, the power of a state to impose its taxes upon non-Indians doing business with Indians has been consistently upheld by this Court. *Thomas v. Gay*, 169 U.S. 264 (1898). The fact that a Tribe may impose its tax upon that same business transaction should not be grounds for ousting the State of its sovereign power. The situation is nothing more than the classic case of two jurisdictions — each having taxing power — exerting that power against the same individual or transaction. Just as two sister states may each impose its own tax upon income earned in one state by the resident of another (*Maine v. New Hampshire*, 426 U.S. 660 (1976)), or upon the same item of personal property, if purchased in one state and used in another (*Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)), so also the Tribe and the State each have the power to tax. The exercise of that power by one does not oust the power of the other. *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). By allowing the Tribal tax to oust the State of its power to tax, the district court conferred upon the Tribes a power superior to that possessed by any state!

The district court found that the imposition of the State's tax would interfere with the "right of tribal self-government", citing *Williams v. Lee*, 358 U.S. 217 (1959). That case, however, is inapplicable because it merely preserves the immunity of reservation Indians from state law; it does not protect *non-Indians* from state law. Nothing in the concept of "tribal self-government" would allow an Indian Tribe to market *its immunity* from state law to non-Indians. Additionally, the Tribes have failed to demonstrate that elimination of cigarette sales as a revenue source would threaten the self-governing ability of the Tribes. There is no evidence that the Tribes will be unable to govern themselves if this revenue source becomes unavailable.

The district court also found that the Tribes' tax on cigarette sales preempted the State's tax. Asserting that in imposing their taxes, the Tribes were exercising federally delegated power under §16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476 (1976), the court reasoned that imposition of the State's tax would conflict with the congressional purpose underlying the enactment of the IRA — revitalization of tribal self-government and fostering Indian economic development. However, §16 of the IRA delegates no powers to Indian Tribes, but at best merely "confirms" whatever powers Tribes already possessed. *United States v. Wheeler*, 435 U.S. 313 (1978). A tribal power to tax non-Indians is not a federally delegated power; it is at best based upon a treaty power to exclude non-Indians from the Tribes' reservations. Furthermore, the congressional purposes underlying the IRA do not dictate — expressly or by implication — a tax exemption for *non-Indians* dealing with reservation Indians. Far from evidencing a congressional intent that Indian enterprises be conferred with the competitive advantage which stems from a non-Indian's immunity from state taxation, the IRA adopts a policy of placing Indian businesses on an *equal competitive footing* with non-Indian enterprises. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).



*Moe, supra*, stands for the proposition that Indian tribes have no recognized right — self-governing or by federal delegation — to market to non-Indians an immunity from state taxation. Judge Kilkenny, dissenting below, implicitly recognized this, and his view should prevail in this appeal.

2. The State may impose its cigarette and sales taxes upon Indians who are not members of the Tribe upon whose reservation the sale occurs. The federal government has not preempted the field of taxation with respect to Indians who have left their own reservations. Federal laws affecting these Indians, e.g., the Major Crimes Act, 18 U.S.C. §1153 (1976), and the Indian Reorganization Act, 25 U.S.C. §476 (1976), *et seq.*, do not dictate otherwise. Additionally, since these Indians are not members of the reservation tribe, and hence not subject to its control, no tribal self-government interest is affected.

### C. ENFORCEMENT ISSUES.

1. The State may require Indian retailers to keep records of sales to both Indians and non-Indians. This record keeping requirement is reasonable and is necessary to assure compliance with the collection requirement found lawful in *Moe, supra*. Where Indian tribes and their licensed retailers establish a scheme primarily for the benefit of immunizing non-Indians from their obligations under state law, the burden of record keeping — even as applied to sales to Indians — is a reasonable one. The "burden" infringes upon no legitimate tribal interest and conflicts with no federal law. *Moe, supra*.

2. The State may seize as contraband unstamped cigarettes moving in interstate commerce to the Tribes' reservations in circumstances where the Tribes and/or their retailers have refused to collect cigarette taxes on sales to non-Indians. A state, in order to safeguard vital local interests, will be permitted to regulate interstate commerce if it does not unduly interfere with that commerce and is not in conflict with an area of regulation

totally preempted by Congress. *Carter v. Commonwealth of Virginia*, 321 U.S. 131 (1944). It is clear that the State has a vital interest in preventing the diversion of untaxed cigarettes into the hands of its non-Indian citizens. Because Congress has not preempted the field, this is a proper exercise of state power.

3. The State may enforce its cigarette tax by *on-reservation* seizures of unstamped cigarettes intended for resale to non-Indians. The clear import of *Moe, supra*, is that where Indians invite non-Indians onto the reservation to escape state law, the State may apply its police power to reservation Indians.

### D. MOTOR VEHICLE EXCISE TAX ISSUE.

The State may impose its motor vehicle excise tax upon vehicles owned by a Tribe or its members when those vehicles are used on public highways outside the reservation. The motor vehicle excise tax is a true use tax, imposed for the privilege of *using* a motor vehicle. Thus, unlike the property tax on motor vehicles involved in *Moe, supra* — a tax on ownership — the legal incidence of the motor vehicle excise tax occurs wherever and whenever the vehicle is used. To the extent the vehicle is used outside the reservation, the legal incidence of the tax falls upon such use, and, under *Mescalero, supra*, the tax may be validly imposed.

## ARGUMENT

### I. THE APPEALS ARE WITHIN THE JURISDICTION OF THIS COURT PURSUANT TO 28 U.S.C. §1253 ON THE BASIS THAT THE ORIGINAL ACTIONS WERE PROPERLY WITHIN THE JURISDICTION OF A THREE-JUDGE DISTRICT COURT PURSUANT TO 28 U.S.C. §2281

### A. INTRODUCTION.

By motion filed with the Court on February 12, 1979, the Solicitor General sought to have the appeal in No. 3909 below (the *Yakima* case) dismissed for lack of jurisdiction. On February 14, 1979, the State filed a Brief Opposing United States Motion to Dismiss. On February 21, 1979, the Court entered an order reading as follows:

> "Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits." (A.255)

Accordingly, in this portion of our brief, we will respond more fully to the Solicitor General's arguments in *Yakima* on the question of jurisdiction. In so doing, we will be referring as well to No. 3868 below (the *Colville* case). As the Court apparently recognized in its order of February 21, 1979 (which by its terms encompasses both *Yakima* and *Colville*) the jurisdictional question raised by the Solicitor General is also present in *Colville*.[22]

*Colville* was commenced on May 17, 1973, and *Yakima* was commenced on July 18, 1973 (A.1, 138). As of those dates, 28 U.S.C. §2281 (1970) read as follows:

> "An interlocutory or permanent injunction *restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute* or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof *upon the ground of unconstitutionality of such statute* unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." (Emphasis supplied)

Although this provision was later repealed by Act of August 12, 1976, Public Law 94-381, § 1, 90 Stat. 1119,

[22]The Tribes in *Colville* have not raised this same jurisdictional question. *Colville*, however, involves the same critical legal issues, including the issue of the constitutionality under U.S. Const., Art. I, Sec. 8, cl. 3 (Commerce Clause) of the state statutory scheme dealing with contraband cigarettes moving through the state from outside to destinations within the state but within Indian reservations as well. (RCW 82.24.130).

these actions were not affected since they were both pending on the date of the repeal. *Accord*, § 7 of Public Law 94-381, *supra*.

### B. ARGUMENTS OF SOLICITOR GENERAL.

Nevertheless, and in spite of the fact that it was the United States which originally invoked 28 U.S.C. §2281 (1970), *supra* (A.145), the Solicitor General now argues as follows:

(1) That No. 3909, which the United States initiated, should, instead, have been heard and determined by a single federal district court judge; and, therefore,

(2) That the appeal in No. 3909 does not fall within the ambit of 28 U.S.C. §1253 (1976)[23] and, accordingly, should be dismissed.

The Solicitor's argument focuses, as it must, on §2281 and is essentially two-pronged. The first prong involves state enforcement efforts within the reservations and the second pertains to enforcement efforts outside those reservations. Initially, it is argued that under *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the challenges by the United States and the Tribes to *on-reservation* application and enforcement of the state cigarette and sales taxes present only Supremacy Clause issues which do not fall within the scope of §2281. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S.

[23]Section 1253 reads as follows:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding *required by any Act of Congress to be heard and determined by a district court of three judges.*" (Emphasis supplied)



463, 481, n. 17 (1976).[24] Then, secondly, it is argued that the challenges to *off-reservation* enforcement of the State's cigarette taxes, through seizure of unstamped cigarettes en route to the reservation, likewise do not fall within the scope of §2281, even though the State's off-reservation enforcement efforts clearly raise a Commerce Clause issue — and not just a Supremacy Clause issue.

### C. RESPONSE TO ARGUMENTS OF SOLICITOR GENERAL.

#### 1. Preliminary observations.

We will take up each argument in turn. But before so doing, two preliminary observations seem appropriate. First, the United States has offered no policy reasons — and we know of none — to delay ultimate resolution of the enormously important substantive issues raised in this appeal. Further delay will only serve to exacerbate the controversy between the parties and will contribute nothing to its correct resolution. There is no reason to believe that this Court will benefit from additional analysis by the Court of Appeals — the issues were fully briefed by the parties and the court below entered an exhaustive opinion.

Secondly, with the repeal of 28 U.S.C. §2281 in 1976, there is no longer any need for concern about minimizing this Court's mandatory docket in the interest of judicial administration. The policy reasons which have in the past prompted the Court to apply §2281 as narrowly as possible no longer exist.

#### 2. Taxation of on-reservation activities.

We turn, next, to the argument based upon footnote

[24]In describing this first prong of attack upon the Supreme Court's jurisdiction the term "assumption" is probably more accurate than "argument". The Solicitor General merely assumes — as indeed did the district court itself (J.S. App. 14) — that under footnote 17 in *Moe* no substantial Commerce Clause issue could be presented, for purposes of §2281, with respect to on-reservation application and enforcement of the taxing statutes. We here challenge that assumption.

17 in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481 (1976). The focus here is the same as in *Moe*, *i.e.*, upon the application and enforcement of the cigarette tax within the reservation itself.

In *Moe*, this Court barred the application of the Montana personal property tax to on-reservation Indian-owned automobiles. It also barred the application of the Montana cigarette tax to on-reservation sales by Indians to other Indians. After citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), as the basis for its holding, the Court stated in footnote 17:

> "It is thus clear that the basis for the invalidity of these taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause, U.S. Const., Art VI, cl 2, and not any automatic exemptions 'as a matter of constitutional law' either under the Commerce Clause of the intergovernmental-immunity doctrine as laid down originally in *M'Culloch v. Maryland*, 4 Wheat. 316 (1819). If so, then the basis for convening a three-judge court in this type of case has effectively disappeared, for this Court has expressly held that attacks on state statutes raising only Supremacy Clause invalidity do not fall within the scope of 28 USC § 2281. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965). Here, however, the District Court properly convened a § 2281 court, because at the outset the Tribe's attack asserted unconstitutionality of these statutes under the Commerce Clause, a not insubstantial claim since *Mescalero* and *McClanahan* had not yet been decided. See *Goosby v. Osser*, 409 U.S. 512 (1973)." 425 U.S. at 481.

The Solicitor General asserts that, pursuant to this footnote, the attack by the United States and the Tribes upon the on-reservation application and enforcement of Washington's cigarette and sales taxes did not require a three-judge court. We submit, to the contrary, that the same policy considerations which caused this Court to sustain the convening of a three-judge district court in



*Moe, supra*, notwithstanding *McClanahan* and *Mescalero*, are equally applicable here.

In the first place, it will be noted that neither *McClanahan* nor *Mescalero* involved the question of a three-judge federal district court at all. The reason for this, quite simply, was that neither of those cases originated in federal court. Instead, *McClanahan* was a state court case from Arizona in which a decision of the Arizona Court of Appeals[25] was reviewed (and reversed) by this Court pursuant to a writ of certiorari. And similarly, *Mescalero* involved a decision of the New Mexico Supreme Court[26] which, again, came to this Court by certiorari rather than appeal. Thus it was not until three years after *McClanahan* and *Mescalero* that this Court in *Moe, supra*, delivered the message that is critical here, *i.e.*, that a case such as *McClanahan* or *Mescalero*, if commenced in federal court instead of state court, does not (or more properly, did not) fall within the purview of 28 U.S.C. §2281, *supra*.

Bearing that in mind, our point here will readily be seen from the following time table:

Prior to 3/27/73—Three-judge court convened in *Moe*
3/27/73—*McClanahan* and *Mescalero* decided, U.S. S.Ct.
5/17/73—No. 3868 (*Colville*) filed (USDC)
6/18/73—Three-judge court convened in No. 3868
7/18/73—No. 3909 (*Yakima*) filed (USDC)
7/20/73—Three-judge court certified in No. 3909
5/10/74—*Moe* decided by three-judge district court
4/27/76—*Moe* decided by U.S. S.Ct.
3/28/77—Oral Argument in No. 3868 and No. 3909
2/22/78—No. 3868 and No. 3909 decided
5/10/78—Final Orders entered in Nos. 3868 and 3909

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[25] *McClanahan v. State Tax Comm'n*, 14 Ariz. App. 452, 484 P.2d 221 (1971).

[26] *Mescalero v. Jones*, 83 N.M. 158, 489 P.2d 666 (1971).

Because *McClanahan* and *Mescalero* had not been decided when the three-judge district court in *Moe* was first convened, whatever message was to be derived from those cases regarding the necessity for such a court was ruled by this Court to be inapplicable to that case.[27] But because neither *McClanahan* nor *Mescalero* were federal court cases at all it took this Court's decision in *Moe* to deliver that message. And that did not occur until April 17, 1976, more than three years after *McClanahan* and *Mescalero* were themselves decided. Long before, however, the three-judge court in both *Colville* and *Yakima* had been convened and had commenced functioning.

The Solicitor General, we presume, would nevertheless argue that the message should have been clear on March 27, 1973, the date *McClanahan* and *Mescalero* were decided by this Court. The argument would be that the opinions in *McClanahan* and *Mescalero* themselves, together with *Swift & Co. v. Wickham*, 382 U.S. 111 (1965), should have been sufficient to deliver that message, completely unaided by footnote 17 in *Moe*.

Such an argument, we agree, would have force if *McClanahan* had clearly held (or even stated in *dicta*) that the Commerce Clause was not an independent and automatic source of immunity from state taxing statutes as applied on Indian reservations. In *Mescalero*, of course, the Court had clearly held exactly that with respect to the doctrine of intergovernmental immunity — for it upheld the New Mexico gross receipts tax which had been challenged on the basis of that doctrine. But did the Court do the same thing in *McClanahan* with respect to the Commerce Clause? We suggest that it did not. And the reason it did not is simply that it was not in any way required to do so; for the question was not really before it.

The opinion in *McClanahan*, we recognize, discussed extensively various treaty and statutory provisions as the basis for its decision. But it also stated, at 411 U.S. 164, 172, n. 7:

[27] 425 U.S. 463, 481, n.17, *supra*.



> "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making. See U.S. Const. Art. I, § 8, cl. 3; Art. II, § 2, cl. 2. * * *"

Does the Indian Commerce Clause, however, constitute *solely* a source of congressional authority and thus remain ineffective as a bar to state laws unless and until Congress exercises that authority? Or, on the other hand, does that clause create, automatically, certain immunities from state law which exist independently of congressional action and which continue to exist until congressional action eliminates them? Or, thirdly, does that clause, like the interstate Commerce Clause, do some of both? *Cf., Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

The Court in *McClanahan* would have been faced with these questions if the case had originated as an injunctive action in the federal courts, for it would then have had to answer them in the context of determining the applicability of §2281. However, as we have already seen, the case originated instead in state courts; further, it was a refund action and not an injunctive action at all.

The Court in *McClanahan* would have also been faced with these questions had it there first determined that no bar to state taxation had been created by congressional action, in various treaty and statutory provisions. But the Court determined just the opposite, *i.e.*, that those provisions created such a bar. And, accordingly, the Court did not have to go on to address the question of whether the Indian commerce clause, by itself, created a similar bar.

Of course it is *now* clear, after *Moe*, that the clause is solely a source of congressional authority which creates no automatic bar to state tax law, at least so far as on-reservation application of that law is concerned. But that proposition was not clear from the *McClanahan* decision on March 27, 1973. Moreover, clarity on this precise question was not greatly enhanced, in our view at

least, when this Court stated on the same date, in *Mescalero*:

> "* * * in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, *and McClanahan v. Arizona State Tax Comm'n, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.*" 411 U.S. at 148 (Emphasis supplied).

This statement is a completely correct description of *McClanahan* — and that is precisely what creates the problem. The statement does not necessarily say that under *McClanahan* the on-reservation tax immunity can be found only on the basis of specific congressional action. On the contrary, by its use of the word "consent" it suggests that the function of congressional action is to remove such barriers to state tax laws as have been already established through some other source (such as the Indian commerce clause) and not to erect those barriers in the first place.

In short, while *McClanahan* and *Mescalero* clarified certain points, it took *Moe* to assemble the pieces and complete the picture. On the precise question of the effect of the Indian commerce clause, those two earlier decisions were not nearly so clear on March 27, 1973, when originally rendered, as they later became on April 27, 1976, the date of the decision in *Moe*. Therefore, we submit that the controlling date should be the later one and, under the *Moe* rationale, there was thus no need to disband the three-judge court after that date or to treat that court now as a single-judge court for purposes of this appeal.[28]

[28] *See also, Goosby v. Osser*, 409 U.S. 512 (1973), the final case cited in *Moe*, footnote 17, *supra*, wherein the following test was enunciated:

> "Title 28 U.S.C. §2281 does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial. 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' *Bailey v. Patterson*, 369 U.S., at 33; 'wholly insubstantial,' *ibid.*; 'obviously frivolous,' *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288 (1910); and 'obviously without merit,' *Ex parte Poresky*, 290 U.S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only *if the prior decisions inescapably render the claims frivolous*; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C §2281. A claim is insubstantial only if ' "its unsoundness *so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference* that the questions sought to be raised can be the subject of controversy." ' *Ex parte Poresky, supra*, at 32, quoting from *Hannis Distilling Co. v. Baltimore, supra* * * * ." 409 U.S. at 518 (Emphasis supplied).



### 3. Off reservation seizures.

The Solicitor General's second, and principal, argument focuses upon the off-reservation enforcement actions of the Department of Revenue. In evaluating this argument, let us first examine the relief which the United States (in *Yakima*) and the various Tribes (in *Colville*) requested in their complaints and in the pre-trial orders which, by their terms, superseded the complaints. *See Yakima* Pre-trial Order, A.199; *Colville* Pre-trial Order, A.59.

The relief requested in both *Yakima* and *Colville* was directed to a very practical problem. The State was seizing shipments of unstamped cigarettes while they were en route from out-of-state suppliers to the various Indian reservations. The pre-trial orders identify four such off-reservation seizures, all of which occurred before the filing of the respective complaints.[29] The pre-trial orders also show that the State fully intended to continue such

[29] *See Yakima* Pre-trial Order, ¶5.15, A.182-183; *Colville* Pre-trial Order, ¶¶2.8-2.9, A.34-35. The State's attempt was, quite simply, to cut off the out-of-state supply of cigarettes. The State had by this time cut off the supply from in-state sources and the Tribes, accordingly, had turned to out-of-state suppliers.

seizures.[30] Thus, as would be expected the request for injunctive relief in each of the two cases was carefully framed to include relief against such further seizures. In *Yakima*, the United States requested an injunction:

> "* * * against defendant, its agents, officers and employees enjoining them from engaging in any action or acting in any manner to * * * *stop, prevent or interfere with the transport or delivery of properties purchased by the Yakima Indian Nation for delivery to the Yakima Indian Reservation* * * * and enjoining defendant from acting in any manner to seize or to receive into its possession any of the properties of the Yakima Nation *being moved or which may be moved or* transported in commerce. * * *" (Emphasis supplied) U.S. Complaint, Prayer, ¶d, A.143.

And in *Colville*, the plaintiff Tribes requested an injunction:

> "* * * restraining defendants, their agents, employees, servants, officers, successors and all persons in active consort or participation with them from attempting to assess cigarette excise taxes on sales of cigarettes on Indian reservations, *seizing cigarettes* on said reservations or *enroute to said reservations through the State of Washington* * * *" (Emphasis supplied) Complaint, ¶6.4, A.11.[31]

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[30] *See Yakima* Pre-trial Order, ¶5.15, A.183; *Colville* Pre-trial Order, ¶2.10, A.35.

[31] The pre-trial orders likewise focused directly on the question of the State's power to make these off-reservation seizures. Thus, in *Yakima*, the United States characterized a part of its requested relief as follows:

> "*Threatened Seizure of Shipments to Tribe.* Against the State, its agents, officers and employees for their allegedly wrongful and unlawful acts in threatening to seize as contraband cigarettes and tobacco products upon which state taxes have not been paid being shipped from outside the State to the Tribe intended for resale to licensed Indian retailers on trust property within the Yakima Indian Reservation for eventual resale to persons who are not members of the Tribe." Pre-Trial Order, ¶2.2, A.169.

The United States contended:

> "The seizure of unstamped cigarettes being transported to the Yakima Indian reservation in commerce by the State of Washington to enforce collection of cigarette taxes on sales by licensed Indian retailers to non-Indians is a violation of the commerce clause and the supremacy clause of the Constitution." Pre-Trial Order, ¶7.12, A.190.

In response, the State contended:

> "Washington may classify as 'contraband' unstamped cigarettes owned by the Tribe and intended for ultimate resale by tribally-licensed retailers to non-members of the Tribe in violation of state law, and may seize and sell such cigarettes in the manner prescribed by state law, whether such cigarettes are held on plaintiff-intervenor's Indian reservation or are in transit in interstate commerce to plaintiff-intervenor's Indian reservation from points outside the state." Pre-Trial Order, ¶9.5, A.195.

Likewise, in *Colville*, the pre-trial order reflected the following contention by the Tribes:

> "* * *
>
> "An injunction should issue restraining defendants, their agents, employees, servants, officers, successors and all persons in active consort or participation with them from attempting to assess cigarette taxes on sales of cigarettes on plaintiffs' Indian reservations, *seizing cigarettes on such reservations or en route to such reservations through the State of Washington*, attempting to influence cigarette wholesalers not to sell to plaintiffs and in any way attempting to tax or interfere with the cigarette merchandising activities on plaintiffs' reservations." (Emphasis supplied) Pre-Trial Order, ¶3.16, A.50.



In requesting this relief, of course, the United States and the Tribes recognized the obvious: in making these seizures, the Department of Revenue was enforcing state law in the form of specific state taxing statutes. Stated otherwise, the Director of Revenue did not just decide one morning that, having nothing better to do that day, he would spend it making cigarette seizures. Rather, *he was doing his statutory duty.* And to stop him, the United States and the Tribes recognized that they had to obtain from the District Court a declaration that the statutes under which he was acting were invalid as applied to the Tribes' merchandising activities. Accordingly, the pre-trial order in *Yakima* states:

> "The Tribe seeks to have RCW Chapter 82.08 [sales tax], 82.12 [use tax], *82.24 [cigarette tax]* and 82.26 [tobacco products tax] * * * as it affects sales by

> Indians on the Yakima Indian Reservation *declared void.*" (Emphasis supplied) Pre-trial Order, ¶3.3, A.170.

And on what legal basis were all these statutes to be "declared void"? Because, as applied to Indians, they violated the Commerce Clause. Thus, under the "Contentions of Plaintiff United States" as set forth in the pre-trial order, the first contention is that:

> "This case is within the jurisdiction of a three-judge court under 28 USCA § 2281 *because of the challenge to the state taxing statutes under the commerce clause of the Constitution.*" (Emphasis supplied) Pre-trial Order, ¶7.1, A.188. *Cf.*, ¶7.2-7.5, A.188-189.

Likewise in *Colville*, the Tribes contended:

> "The actions of defendants in enforcing *the cigarette tax provisions of RCW ch. 28.24* as applied to plaintiffs constitute *unconstitutional burdens on Indian commerce in violation of Article I, Sec. 8, Cl. 3 of the United States Constitution.*" (Emphasis supplied) Pre-trial Order, ¶3.15, A.50.

In short, in terms of §2281, *supra*, the United States in *Yakima* and the plaintiff Tribes in *Colville* were asking for an "* * * injunction restraining the enforcement of * * * State statutes" — as contained in chapter 82.24 RCW. The "action of any officer of such State in the enforcement or execution of such statute" which was to be restrained was the action of the Director of Revenue and his employees, taken pursuant to chapter 82.24 RCW, both in seizing cigarettes off the reservation and in enforcing the cigarette tax within the reservation. And lastly, the "ground of the unconstitutionality of such statute[s]," insofar as off-reservation seizures were concerned, was the Commerce Clause. Moreover, it seems clear that the United States Attorney fully realized all this when he stated, in his petition for a three-judge court:

> "COMES NOW Dean C. Smith, United States Attorney for the Eastern District of Washington on behalf of the plaintiff United States of America and petitions the court for a determination in this cause by a three judge court under the provisions of 28 USC §§2281 and 2284.
>
> "This petition is based upon the allegations of the complaint in which the relief requested is a preliminary injunction as well as a permanent injunction *restraining the enforcement of a state statute. Such relief is requested on the grounds of the unconstitutionality of a state statute.*" (Emphasis supplied)[32] A.145.



In nevertheless arguing that the district court erred in giving the United States precisely what it thus asked for (A.146), the Solicitor General now contends, at pp. 9-10 of his Motion to Dismiss:

> "The district court's analysis ignored the distinction between 'a petition for injunction on the ground of the unconstitutionality of a *statute*, either on its face or as applied' — which requires the convening of a three-judge court under Section 2281 — and 'a petition seeking an injunction on the ground of the unconstitutionality of the *result* obtained by the use of a statute not attacked as unconstitutional,' which does not require a three-judge court. *Turner v. Fouche*, 396 U.S. 346, 353-354 N. 10 (1970) (emphasis in the original)."

Let us see who really ignored this declaration — the district court or the Solicitor General.

Admittedly, §2281 was a legal minefield which could be detonated by any number of "slippery distinctions." S. Rep. No. 94-204, 94th Cong., 1st Sess., 1975, p. 5 *reprinted*

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[32]The Solicitor General acknowledges that the United States requested a three-judge court, but now asserts that it did so only on the basis that "* * * such a court was needed to hear the Tribe's claim that *on-reservation sales* were exempt from state taxation." U.S. Motion to Dismiss, p. 8, n. 3 (Emphasis supplied). No citation to the record is given to support this assertion — and for good reason: such a citation cannot be found. Indeed, the complaint of the United States, the pre-trial order, and the United States' petition for a three-judge court, quoted above, all show that the present assertion of the Solicitor General is simply a post-trial concoction, served up for consumption by this Court. We are not so inexperienced as to expect consistency from the Justice Department; but we still indulge the hope that the Department would describe its prior inconsistent positions with a modicum of accuracy.

*in* [1976] U.S. CODE CONG. & AD. NEWS, 1988. But the distinction made by this Court in footnote 10 in *Turner* is not one of them.[33] That distinction is reasonably clear and well-developed. Moreover, it is shown by the same case authority as is cited by the Solicitor General at pp. 9-12 of his Motion to Dismiss. Simply put, if a state official is on essentially a "frolic of his own" — to borrow a term from tort law — a three-judge court is not required. Stated otherwise, for a three-judge court to be convened the administrative action which is challenged as unconstitutional must be attributable to an unconstitutional *legislative* decision, rather than merely an unconstitutional decision of the individual state officer. The "* * * [administrative] action complained of" must be "directly attributable to the statute." *Ex parte Bransford*, 310 U.S. 354, 361 (1940).

Thus, for example in *Bransford* an Arizona statute directed county assessors to do what assessors always do, *i.e.*, to value property. A bank then challenged *the actions* of the assessor in placing certain values on its stock, asserting that the values determined by the assessor were unconstitutionally discriminatory and excessive. The bank also asserted that the values were unauthorized by the statute itself. In response, this Court held that a three-judge court was not required to hear such challenges because the statute itself was not being challenged — as indeed it was not. In short, the assessor, rather than the legislature, made the alleged mistake.

Similarly in *Phillips v. United States*, 312 U.S. 246 (1941), the Governor of Oklahoma called out the Oklahoma National Guard and ordered it to occupy and stop construction on a federally financed dam project. The United States then filed an action in federal district court to enjoin him from interfering with the construction. The Governor argued that a three-judge court was necessary

[33] As we show, however, at p. 49, *infra*, the Solicitor General does not quote in full the relevant portion of footnote 10 in *Turner* and thereby misses the whole point of that footnote.



because he was acting under Oklahoma laws which made him commander in chief of the militia and directed him to cause the laws to be faithfully executed. The Court, however, rejected that argument, saying:

> "But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification." 312 U.S. at 252.

But now, let us contrast the situation in *Bransford* and *Phillips* with that presented here. When the Department of Revenue made three seizures involved in *Colville*, it was acting pursuant to a specific statute, RCW 82.24.130 (Br. App. 24a). That statute told the Department exactly what it was to do, as follows:

> "Subject to the provisions of RCW 82.24.250, any articles taxed herein found at any point within this state, which articles shall be held, owned or possessed by any person, and not having the stamps affixed to the packages or containers are hereby declared to be contraband goods, and may be seized by the department of revenue, or its duly authorized agent, or by any peace officer of the state, when directed by the department of revenue so to do, without a warrant, * * * ." RCW 82.24.130.

It was thus the enforcement of this statute which touched off the litigation in *Colville*. *See* ¶¶2.8 and 2.9 of the pre-trial order in *Colville*, explicitly stating that the three seizures there made were pursuant to this statute (A.34-35).

Conversely, in *Yakima* the off-reservation seizures which touched off the litigation were made pursuant to a different statutory procedure under which a tax warrant is first issued (RCW 82.32.210) and then, on the basis of the tax warrant, a "notice to withhold and deliver" is issued under RCW 82.32.235 to those holding property of the taxpayer. These statutory provisions are incorporated into the cigarette tax law by RCW 82.24.230 and were used to seize from a trucking company cigarettes belonging to the

Yakima Nation. *See* Amended Complaint, ¶¶9-11 (A.160-161).[34]

Admittedly, "[t]here is, of course, no state statute at issue which provides specifically for the seizure of goods moving in interstate commerce." U.S. Motion to Dismiss, p. 10. The statutes pursuant to which the seizures were made in *Colville* and *Yakima* provide for seizure of goods which are moving—or for that matter, resting—anywhere in the state; they do not single out goods moving in interstate commerce. But similarly, the South Carolina taxing statutes under challenge in *Query v. United States*, 316 U.S. 486 (1942), and the Colorado taxing statute under challenge in *Department of Employment v. United States*, 385 U.S. 355 (1966), did not in any way single out or even mention federal instrumentalities. Yet a three-judge court was required to be convened in both of those cases to determine whether those statutes could constitutionally be applied to federal instrumentalities (such as an Army Post Exchange, as in *Query*, or the American Red Cross, as in *Department of Employment*). Thus, contrary to the assertion of the Solicitor General, this case is indistinguishable from those two cases. *See* U.S. Motion to Dismiss, pp. 10 and 11, n. 6.[35]

Finally, the argument of the Solicitor General here is essentially the same as the argument of the appellees in *Turner v. Fouche*, 396 U.S. 346 (1970), a case upon which the Solicitor General purports to rely. The appellees in *Turner* contended that a three-judge court was not required, just as the Solicitor General contends here. This

[34]The Department, in fact, had done more than make this single seizure. By serving similar notices to all truck lines serving the Yakima Reservation, the Department had completely cut off the supply of cigarettes for the Yakima cigarette operation. Amended Complaint, ¶11, A.161. Hence, the litigation was commenced in *Yakima*.

[35]The point made by this Court in *Query* is equally applicable here: "And this [case] is not, like *Phillips v. United States*, 312 U.S. 246, a case in which the state officials threatened to engage in conduct which state law could not reasonably be construed to authorize." 316 U.S. at 490.



Court rejected that contention, however, for reasons which are applicable here—as we now demonstrate by quoting *in full* the third paragraph of footnote 10 in *Turner* from which the Solicitor only quoted part at pp. 9-10 of his Motion to Dismiss, *supra*.

> "*The appellees also propose a distinction between attacks on statutes and attacks upon the results of their administration, and urge that the appellants' case comes within the latter category. But this argument overlooks the line, delineated by our past decisions, that falls between* a petition for injunction on the ground of the unconstitutionality of a *statute*, either on its face or as applied, which requires a three-judge court, and a petition seeking an injunction on the ground of the unconstitutionality of the *result* obtained by the use of a statute not attacked as unconstitutional." (Citing cases, including *Query* and *Bransford*) 396 U.S. at 353, n. 10.[36]

Attacks upon the results of the administration of statutes require a three-judge court, as shown in *Turner*, where those results are directly attributable to the statutes—as was the case in *Turner*. That is also the case here. The second prong of the Solicitor General's attack on this Court's jurisdiction therefore must be rejected along with the first.

## II. ALL ISSUES RAISED BY THE STATE IN *COLVILLE* WERE TIMELY APPEALED TO THIS COURT.

This issue involves only the *Colville* case and was raised by the Motion of Appellee Colville Conf. Tribes [et al.], pp. 8-9 thereof. The events giving rise to the issue are not in dispute and can be summarized as follows: The three-judge district court entered its declaratory judgment and decree of permanent restraint in No. 3868 on May 10, 1978 (J.S. App. 66-70). The State made a timely motion for partial new trial pursuant to Fed.R.Civ.P. 59(a) on

[36]The material which we have underscored forming the first half of the quotation was not quoted by the Solicitor General. The emphasis on the two words "statute" and "result" was the Court's in *Turner*.

May 19, 1978 (A.130).[37] This motion addressed the issue of the State's ability to apply and enforce its cigarette and sales taxes with respect to sales by the Tribes to non-Indians. The three-judge district court, on July 17, 1978, entered an order denying the State's motion for partial new trial (J.S. App. 77-78). On August 14, 1978, the State filed a notice of appeal in No. 3868 dealing with those cigarette and sales tax issues (A.133-134). On September 8, 1978, the State filed an amended notice of appeal in No. 3868 adding the motor vehicle excise tax issues and Public Law 83-280 issues to the cigarette and sales tax issues originally appealed on August 14, 1978 (A.135-136).[38]

[37]FED.R.CIV.P. 59(b) requires that a motion for new trial be *served* within ten days after entry of the judgment. Although the motion was filed with the district court on May 22, 1978 (12 days after entry of judgment), it was timely served by mail on May 19, 1978. *See* Aff. of Service, Mot. for Partial New Trial, p. 1, R; FED.R.CIV.P. 5(b). Where service of a Rule 59 motion is made by mail, it need only be filed with the court within a reasonable time following service. FED.R.CIV.P. 5(d); *Parks v. Ford*, 68 F.R.D. 305 (D. Pa. 1975). *But see Sutherland v. Fitzgerald*, 291 F.2d 846 (10th Cir. 1961). In any event, the tenth day following the entry of the judgment in this case, May 20, 1978, was a Saturday. The motion was both served and filed by the following Monday, May 22, 1978, and thus is timely. FED.R.CIV.P. 6(a).

[38]In No. 3868, the State had first filed a notice of appeal on July 12, 1978, dealing with the motor vehicle excise tax issues and Public Law 83-280 assumption of jurisdiction issues (A.131-132). But, as argued here, a motion for a new trial, timely filed, terminates the running of the time for filing a notice of appeal until disposed of. *United States v. Ellicott*, 223 U.S. 524, 538-39 (1912); *United States v. Seminole Nation*, 299 U.S. 417 (1937). Therefore, an appeal predicated upon the State's July 12, 1978 notice would have been premature and subject to dismissal for want of finality. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 177 (1944); *Kingman v. Western Mfg. Co.*, 170 U.S. 675, 678 (1898). Such a cautionary notice of appeal filed while a Fed.R.Civ.P. 59 motion for a new trial was pending is a nullity. *See Ohio Public Service Co. v. Fritz*, 274 U.S. 12 (1927). *Accord, Turner v. HMH Pub. Co.*, 328 F.2d 136 (5th Cir. 1964); *Napier v. Delaware, L. & W. R. Co.*, 223 F.2d 28 (2d Cir. 1955); *Sampson v. Ampex Corp.*, 335 F.Supp. 242 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 1042 (2d Cir. 1972).



Thus, this Court's jurisdiction of the motor vehicle excise tax issues depends upon the timeliness of the State's notice of appeal filed on September 8, 1978. The critical question to be answered is whether the State's motion for a partial new trial suspended the finality of the three-judge district court's judgment until the date of entry of the court's order denying that motion on July 17, 1978. If the answer to this question is affirmative, the motor vehicle excise tax issues have been timely appealed because these issues were contained in the State's amended notice of appeal in No. 3868[39] which was filed within 60 days of the filing of the lower court's order denying the motion for partial new trial. 28 U.S.C. §2101(b) (1976).

The general rule is that a judgment is not final, for the purposes of computing the time for taking of an appeal, until a motion for a new trial, if entertained by the court, has been disposed of. *United States v. Ellicott*, 223 U.S. 524 (1912); *United States v. Seminole Nation*, 299 U.S. 417 (1937) and cases cited therein. This is because the judgment originally rendered is still under the control of the trial court and therefore cannot be deemed a final disposition of the cause until and unless a new trial has been denied. *Kingman v. Western Mfg. Co.*, 170 U.S. 675 (1898); *Brockett v. Brockett*, 43 U.S. (2 How.) 238 (1844). This rule has been applied whether the post-judgment motion was a petition for a rehearing, a motion for reconsideration or a motion for a new trial. *See United States v. Dieter*, 429 U.S. 6 (1976); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974); *United States v. Healy*, 376 U.S. 75 (1964); *United States v. Ellicott, supra; United States v. Seminole Nation, supra.*

Although this is a direct appeal under 28 U.S.C. §1253 (1976), the policy and practice applied by the courts of appeals are illustrative of the principle the State urges this Court here to apply. For example, in *Richerson v. Jones*,

[39]A.135-136.

572 F.2d 89 (3d Cir. 1978), the court applied this rule and took jurisdiction of an appeal filed within 60 days of the district court's decision denying the appellant's motion for a new trial but more than 60 days after the initial judgment and decree. The court stated:

> "The wisdom of this rule is clear. If the rule were otherwise, the 60-day period for appeal would often pass while the district court was assessing the Rule 59 motion and thus the moving party would lose his right of appeal." 572 F.2d at 93, n. 4.

*Accord, Pierre v. Jordan*, 333 F.2d 951 (9th Cir. 1964), *cert. denied*, 379 U.S. 974 (1965).

Moreover the alternative in a case such as this (motion for *partial* new trial) would be to hold that a portion of a judgment is final for purposes of appeal while another portion of the same judgment is not final for that purpose until disposition of the post-trial motion by the court. Such a view would contravene sound policy, however, because it would encourage, if not require, piecemeal appeals of a single action resulting in confusion, delay, expense to the parties and the courts, and a wasteful expenditure of judicial resources. Thus, the fact that the State filed a motion for a partial new trial is insufficient reason to disregard the general rule regarding nonfinality of judgments pending disposition of Rule 59 motions. As authorized by FED.R.CIV.P. 59(a), a new trial may be granted "on all or *part* of the issues." (Emphasis supplied). And, where a partial new trial has been granted, it has been held that those portions of a judgment not subject to the motion for new trial and not retried do not thereby become a final judgment. Rather they are merged into and become a part of the judgment entered following retrial. *Weymouth v. Colorado Interstate Gas Co.*, 34 F.R.D. 4 (N.D.Tex. 1963), *aff'd*, 367 F.2d 84 (5th Cir. 1965). As the court stated in *Weymouth*,

> "[i]t was necessary that the portions of the verdict and judgment as to the other issues stand until the determination of the [issues subjected to a new trial]; but in such form the judgment was not a final one.



> * * * The portions of the first judgment not set aside as mentioned above are merged into and become a part of the judgment entered following the last jury verdict. * * * the one and only final judgment * * * ." 34 F.R.D. at 6.

*Accord*, C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, §2814 (1973).

In the instant case, the State sought by its Rule 59 motion to obtain a new trial limited to the cigarette and sales tax issues but the entire judgment of the three-judge district court was still under its control. Until disposition of the State's motion, the trial court retained the power to amend, modify or vacate its judgment and, of course, the court retained the power to alter its judgment as a result of any new trial. Therefore, sound policy suggests that this Court should hold the State's timely motion for a partial new trial, pursuant to FED.R.CIV.P. 59(a), to have suspended the finality of the three-judge district court's judgment for purposes of appeal until the date of the entry of the court's denial of that motion. Further, the Court should hold that those portions of the judgment not subject to the State's new trial motion became merged into and a part of the one final judgment which resulted from the district court's decision to deny the State's motion for a new trial.

The conclusion follows that the State filed a timely notice of appeal from the denial of that motion which, as timely amended, raised all issues decided adversely to the State by the district court. This Court therefore has jurisdiction of both the cigarette and sales tax issues and the motor vehicle excise tax issues in No. 3868 under Sup. Ct. R. 11(3).

## III. A STATE MAY IMPOSE UPON AN INDIAN TRIBE AND/OR ITS LICENSED INDIAN RETAILERS THE OBLIGATION TO COLLECT STATE EXCISE TAXES ON SALES OF CIGARETTES TO NON-INDIANS WHERE THE LEGAL INCIDENCE OF THE TAX FALLS ON THE NON-INDIAN, DESPITE THE

FACT THAT THE TRIBE HAS ADOPTED ORDINANCES TAXING THESE SAME TRANSACTIONS.

A. **INTRODUCTION.**

This issue is common to both the *Colville* and *Yakima* cases. It is the most crucial issue in this case because it involves the power of the State to tax non-Indians and the power of the Tribes to preempt that state power.

Only three years ago, in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), this Court unanimously held that the State of Montana could require tribally-licensed Indian cigarette retailers to collect and remit a state excise tax imposed on non-Indian purchasers of such cigarettes. The Court found that requiring collection by Indians of this "concededly lawful tax" upon non-Indians (425 U.S. at 483) neither frustrated tribal self-government nor ran "afoul of any congressional enactment dealing with the affairs of reservation Indians" (425 U.S. at 483).

The district court nevertheless held that a state could not even impose its cigarette tax on non-Indian purchasers, and *a fortiori* could not require Indians to collect that tax where the Tribe imposed its own tax on these same transactions. In the district court's view, the state tax on non-Indians was "preempted" by the Tribe's tax and interfered with the right of tribal self-government.

This issue, therefore, involves the question of whether *Moe* will continue to have any vitality. If the State can impose its cigarette taxes on non-Indian purchasers, it can require tribally-licensed retailers to collect that tax and remit it to the State. No one seriously contends otherwise. On the other hand, if the State cannot impose its tax on such non-Indian purchasers, it admittedly cannot require Indians to collect that tax. But in that event *Moe* would be meaningless.

In this section of the brief, we will show that Washington's cigarette and sales taxes are as "lawful" as Montana's cigarette tax, as applied to cigarettes purchased by non-Indians from reservation Indians. The State will



also demonstrate that Washington's taxes are indistinguishable in operation and effect from Montana's tax, and that the factors which motivated this Court to uphold the Montana tax collection requirement as applied to Indian sellers are equally applicable here.[40] Before so doing, however, we first describe in some detail the basis for the district court's holding. That holding, of course, not only struck down the collection requirement, but struck down as well any imposition of the state tax upon the non-Indian customers.

The district court adopted two alternative theories in support of that holding, a federal preemption theory and a theory based upon the concept of tribal self-government. Under the preemption theory, the court first found that the Tribes were exercising federally delegated power to tax non-Indians. The court found this delegation in section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476 (1976), which delegates to Indian tribes those "powers vested in any Indian tribe or tribal council by existing law." According to the court, the power to tax non-Indians as well as Indians was a power vested in an Indian tribe by existing law, citing *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956). The court reasoned that since the

[40]It would perhaps be helpful to an understanding of the State's position to set forth what the State is *not* contending. First, the State is not contending that it can impose its excise taxes upon reservation Indians with respect to activities taking place solely within reservation boundaries. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). Second, the State is not contending that the status of land, *i.e.* whether held in fee or in trust or restricted status, makes any difference as to the tax liability of Indian retailers. *See Moe, supra*, and *Bryan v. Itasca County*, 426 U.S. 373 (1976). Third, the State is not contending that congressional consent to the state assumption of civil and criminal jurisdiction over Indian reservations pursuant to Public Law 83-280 includes the assumption of state taxing jurisdiction over Indian tribes and Indians residing on the reservation. *See Bryan, supra*. Finally, the State does not contend that it can impose its tobacco products (cigars and pipe tobacco) tax, chapter 82.26 RCW, on reservation Indian retailers. As noted by the district court (J.S. App. 23, n. 15), the legal incidence of the tobacco products tax falls upon the reservation retailer. The State does not dispute this finding, and it is not within the issues raised on appeal.

tribal taxing scheme regulated the same subject matter as the State's taxing scheme, the State's scheme must give way (J.S. App. 32-35). The court did not discuss at all the impact of *Moe, supra,* on this line of reasoning.

Under its second and alternative theory, the court held that the State's cigarette taxing scheme constituted an impermissible interference with tribal self-government. After noting that "* * * both the State and the Tribes seek to tax non-Indians as a result of their on-reservation transactions with Dealers * * * ." (J.S. App. 37), the court found that the economic effect of the combined state and tribal cigarette taxes, which we have described at pp. 19-21, *supra*, would result in depleting the Tribes' tax base and possible elimination of essential revenues needed for tribally-sponsored programs. In the court's view, the Tribes had thus demonstrated, through this economic effect, an "actual interference" with tribal self-government (J.S. App. 39).

This economic effect played a crucial role in the court's reasoning, under both its preemption theory and its tribal sovereignty theory. This is shown by the court's repeated references to that effect.

Thus, in its discussion of the facts, and before discussing either legal theory in *Colville,* the court stated:

> "Due to the competitive advantage enjoyed by the Tribes over retailers who do impose the State's tax, nearly 90 percent of the Tribes' sales are made to non-Indians. The State tacitly concedes the Tribes' source of cigarette tax revenue would dry up if they were forced to add the State tax to the cost of their cigarettes. The facts dictate that the tribal taxes could not be a continuing source of income if tribal cigarette sales to non-Indians are also subject to State's cigarette tax; tribal cigarette sales to non-Indians would be eliminated and the cigarette sales commerce between the Tribes and non-Indians would be destroyed. Thus, each Tribe's ability to fund its sponsored programs would suffer substantial interference." (J.S. App. 7-8).



In discussing the preemption theory, the district court returned again to this economic effect:

> "The bulk of the revenue derived from the tribal taxes comes from sales to non-Indians. The impact of imposing the State's cigarette tax in addition to the tribal tax will not only eliminate the Tribes' competitive advantage but it will give off-reservation retailers a substantial price advantage. Thus, it is not hard to understand why the State conceded that:
>
> > " 'Assuming that the court finds that the State could require the Tribe and/or its licensed retailers to add the State tax to the sale price of cigarettes sold to non-Indians, *it is painfully apparent that very few, if any, cartons of cigarettes would have been sold.*' (Emphasis added.)
>
> "Under such circumstances, the objectives of Congress in making the delegation of power and of the Tribes in passing the taxation ordinances for tribal usage would obviously be frustrated. Therefore, the application of the State's tax has been preempted." (J.S. App. 35).

And again, in discussing the tribal self-government theory, the court stated:

> "In this case, both the State and the Tribes seek to tax non-Indians as a result of their on-reservation transactions with Dealers. The impact of superimposing the State's cigarette tax on the tribal taxes has already been discussed in this opinion. However, it bears repeating that at least with regard to a commodity as highly price elastic as cigarettes, the result will be the depletion of an already limited tribal tax base, probably destruction of the tribal enterprises and elimination of essential revenues needed for tribally sponsored programs." (J.S. App. 37).

In *Yakima,* the court emphasized once again the impact on the smoke shops stemming from imposition of the state tax upon the non-Indians.

> "As in No. 3868, the competitive advantage enjoyed by the Tribe due to its refusal to impose the State's cigarette tax has resulted in the majority of tribal

cigarette sales being made to nonmembers of the Tribe. The stipulations of fact and testimony of Cyril Herrmann establish that superimposing the State's cigarette tax of $1.60 per carton upon tribal sales would have the same impact as it would in No. 3868. That is, the tribal cigarette enterprise would be destroyed, thus eliminating a source of tax revenue upon which the Yakima Tribal Council relies for a substantial amount of its operating capital." (J.S. App. 49-50).

The district court's reasoning, in short, was essentially as follows: In order to keep their non-Indian customers, the Indian smoke shops require, as a practical economic matter, the competitive advantage which stems from the immunity of those customers from state taxation. Without that competitive advantage, the non-Indians will buy their cigarettes elsewhere. And the Tribes, in turn, require a brisk trade between the smoke shops and their non-Indian customers in order to derive their tax revenue from that trade for funding tribal programs.

Thus, under both the "preemption" and "tribal self-government" theories as articulated by the district court, Indian tribes are conferred the right to bestow upon, and market to, non-Indians an immunity from state law in order to raise revenues for tribal programs.[41]

Three consequences or corollaries which follow from the district court's reasoning should here be noted. First, under that reasoning, the question of who collects the tax from the non-Indians is really irrelevant. It makes no difference whether the tax is collected by the State directly, or by the Indian retailers, who then remit it to the State, as in *Moe*. For the very imposition of the tax, regardless of who collects it, would drive off the

[41]The majority distinguished *Moe* on the grounds that in *Moe* there was no tribal tax and the tribe itself supposedly received no direct benefits from the cigarette sales (J.S. App. 39).

Judge Kilkenny, in dissent, found that *Moe* was indistinguishable. He noted that the only difference was the tribes' decision to levy a tax on the sale of cigarettes. In his view, "[t]he mere imposition of a tribal tax [did] not rise to the level of a preemption of the taxing field on that article." (J.S. App. 63).



non-Indian customers. And thus the district court enjoined the imposition of the tax, and not just the collection requirement. This result followed inexorably from the district court's reasoning. Simply enjoining the requirement of Indian collection would not be sufficient; for the State could still dry up the non-Indian market through direct collection.

Secondly, under the district court's reasoning it would appear that the tribal right which the district court found would be violated by the State if the State were to *repeal* its cigarette tax completely, for all Indians and non-Indians alike. Though this statement may sound startling, it only shows the startling nature of the tribal right, as found by the district court. For the effect of such a repeal would clearly be to eliminate the competitive advantage enjoyed by the smoke shops, and to eliminate thereby the non-Indian market and the tribal tax base attributable to that market. If, as the district court found, the Tribes have a right to that tax base — and therefore a right to that market — elimination of that market by a complete repeal of the cigarette tax would, quite logically, constitute a violation of that right.

Thirdly, under the district court's reasoning, it makes no difference whether the legal incidence of the *tribal* tax is upon the non-Indians themselves — as in *Colville* — or whether it is upon the Indian retailers — as in *Yakima*. For if the non-Indian customers are taxed by the State, the tribal cigarette tax will lose most of its tax base, i.e., the portion attributable to business with non-Indians, in *either* event. The economic effect will be the same, regardless of the precise legal incidence of the tribal tax.[42]

[42]The opinion of the district court can be somewhat confusing on this point. In its opinion in *Colville*, the court seems to stress the fact that the Tribal taxes are imposed upon the non-Indian purchasers, under the apparent assumption that this fact has some legal significance. For example, the court states: "In this case [*Colville*] both the State and the Tribes seek to tax non-Indians as a result of their on-reservation transactions with Dealers." (J.S. App. 37) But under the court's reasoning, as outlined above, this fact actually has no such legal significance. And the court seems to recognize this, at least implicitly,

Because of this third consequence or corollary, we discuss the *Yakima* case first, thus reversing the order followed by the district court. If the Tribal tax in *Yakima*, which is imposed upon the Indian retailers, does not oust the State of power to impose its own tax upon the non-Indians, and of its power to require the retailers to collect that tax, the Tribal taxes in *Colville* certainly do not either, even though they are imposed directly upon the non-Indians. If the district court's reasoning is invalid as applied to the Tribal tax in *Yakima*, it is invalid as applied to the Tribal taxes in *Colville* as well.[43]

Similarly, we discuss the issue of interference with tribal self-government first, thus reversing again the order followed by the district court. This is because federal

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by applying that same reasoning and reading the same result in *Yakima*, where, of course, the legal incidence of the Tribal tax is clearly upon the Indian seller.

Perhaps the court felt more comfortable, in adopting its two theories, in stressing the fact that the Tribal taxes in *Colville* were imposed upon the non-Indian purchasers. For both theories are based upon some sort of conflict between the Tribal and state taxes; and if the legal incidence of the two taxes is the same, the conflict appears more acute. But if the court's theories are actually premised upon the fact that the legal incidence of the Tribal tax is upon the non-Indians, two consequences would follow: in *Yakima*, those theories would have no applicability at all; and in *Colville* it would be necessary to resolve the question of the validity of the Tribal tax in the first instance, before even the reaching the question of the validity of these theories.

[43]The Tribal taxes in *Colville* present, however, an issue not present in *Yakima*. Because they are imposed upon non-Indians, they are not, in our view, even valid in the first instance. For Indian tribes have no power to impose taxes upon non-Indians, under the rationale of this Court's decision in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). Thus, we do not contest the validity of the Tribal tax in *Yakima*; but we contest most vigorously the validity of the Tribal taxes in *Colville*. And if these taxes are invalid, one need not reach the question of the validity of the district court's reasoning; a Tribal tax which is itself invalid certainly cannot oust a state tax under any theory. But likewise, if the district court's reasoning is invalid, as applied in both *Yakima* and *Colville*, one need not reach the question of the validity of the tribal taxes in *Colville*. And it is to this reasoning that our principal argument is here addressed.



preemption under §16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476 (1976), ultimately depends upon a finding of interference with tribal self-government. The purpose of the IRA was to revitalize tribal self-government. *Fisher v. District Court*, 424 U.S. 382, 387 (1976). If the state's tax does not conflict or interfere with that purpose, it is not federally preempted. *Cf. Hines v. Davidowitz*, 312 U.S. 52 (1941).

However, before responding directly to the issues raised by the district court's analysis, we begin by setting forth the legal basis of the power of the state to tax its non-Indian citizens engaged in economic transactions on Indian reservations.

### B. A State May Impose An Excise Tax On Its Non-Indian Citizens With Respect To Purchases Made From A Tribe Or Its Licensed Retailers So Long As The State's Tax Does Not Discriminate Against Such Non-Indian Purchasers.

The states have historically been permitted to tax non-Indians owning property on Indian reservations or engaged in economic transactions with reservation Indians. *Utah & Northern Ry. v. Fisher*, 116 U.S. 28 (1885); *Thomas v. Gay*, 169 U.S. 264 (1898); *Moe, supra*. And for purposes of this argument, the State does not dispute the right of the Tribes to tax the sale of cigarettes to non-Indians by the licensed retailers of the Tribes within the limits of the Tribes' reservations.[44]

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[44]Alternatively, the State will argue that the Tribes have no authority to tax non-Indians, either as a matter of exercising federally delegated authority, pp. 81-84, *infra*, or by reason of "inherent tribal sovereignty", pp. 75-78, *infra*. If the Tribes have no power to tax non-Indian purchasers, by definition there can then be no "tribal preemption" or "interference with tribal self-government". However, if the State is correct in arguing that tribal taxes do not preempt state taxes, there is no need to reach the question of tribal taxing power over non-Indians.

Even assuming, arguendo, that the Tribes have the power to tax non-Indian purchasers, what we have then is a classic situation of two jurisdictions — each having taxing power — exerting that power against the same individual or transaction.

In these times, it cannot seriously be contended that the exercise of taxing power by one government *ipso facto* excludes the exercise of taxing power by another government exercising territorial jurisdiction over the person or transaction sought to be taxed. The taxing power is a fundamental attribute of sovereignty, capable of being exercised to the fullest extent throughout the territory of the sovereign — and denied only for the weightiest concerns. Thus, a state is not precluded from taxing the income of its citizens just because the United States also imposes a tax on the income of such citizens. *Graves v. New York*, 306 U.S. 466 (1939). Indeed, a state may tax the income of its residents earned in another state without providing for a credit for income taxes paid to the state in which the income was earned. *See Maine v. New Hampshire*, 426 U.S. 660, 664 (1976); *see also, Guaranty Trust Co. v. Virginia*, 305 U.S. 19 (1938).

Perhaps more directly in point, a state may impose an excise tax on its own citizens with respect to in-state use or consumption of an article purchased in another state. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). This power to tax is not affected by the exercise of taxing power by the state in which the article is purchased. *Henneford, supra*. For example, Washington may tax its citizens with respect to in-state use or consumption of cigarettes purchased in Oregon.[45] Taxing such cigarettes when consumed in Washington may discourage Washington citizens from purchasing cigarettes in Oregon, and hence reduce the tax base of Oregon, but that does not infringe upon the sovereign right of Oregon to tax purchases of cigarettes made in that state.

[45]In fact, Washington does tax its citizens who purchase cigarettes in Oregon for consumption in Washington, and does not give its citizens a credit or offset for taxes paid to Oregon. *See* RCW 82.24.020, Br. App. 22a.



Insofar as Washington's citizens are concerned, they will suffer "double taxation" on cigarettes purchased in another state. But the federal constitution "* * * no more prohibits double taxation than it does doubling the amount of a tax * * * ." *Fort Smith Lumber Co. v. Arkansas*, 251 U.S. 533 (1920) (Holmes, J.). So long as Washington's tax is not discriminatory, *i.e.*, so long as it is imposed at the same rate on all cigarettes consumed in the state — without regard to state of purchase — the tax will be permitted to stand.[46] *Henneford v. Silas Mason Co., supra*.

The point to be made here is simply stated. Where two entities have territorial jurisdiction to tax a person or transaction, both may exercise that power independently of the other, so long as neither discriminates against the citizens of the other.

To be sure, the economic effect of a state imposing a cigarette tax on a resident with respect to cigarettes purchased outside the state may very well reduce the tax revenues of a sister state by discouraging purchases of cigarettes in the sister state. However, so long as a state's tax treatment of its residents and nonresidents is equivalent, *i.e.*, nondiscriminatory, (*cf. Austin v. New Hampshire*, 420 U.S. 656 (1975)) there is no constitutional prohibition.[47] The result will necessarily be "double taxation" in the sense that each entity retains the power to impose its tax independent of the other. But this result

[46]The Due Process Clause and limits on Washington's territorial jurisdiction would prevent Washington from requiring Oregon retailers to collect Washington's tax on cigarettes. But that is not a barrier to imposing collection responsibility on Indian retailers where Indian reservations are located within Washington. *Moe, supra*.

[47]Here, there is no claim that Washington's cigarette and sales taxes, as applied to non-Indians purchasing cigarettes from reservation retailers, are discriminatory. Nor could there be. The taxes are the same, whether the non-Indian purchases cigarettes from an Indian retailer or a non-Indian retailer. Thus, to the extent that both the State and the Tribes seek to impose a tax upon non-Indians purchasing from tribal retailers, both jurisdictions may constitutionally impose such a tax.

poses no constitutional problems. *Maine v. New Hampshire, supra*; *Graves v. New York, supra.*

Lower federal courts which have considered this problem (with the exception of the court appealed from in this case) have recognized the foregoing analysis. For example, in *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976), *cert. denied,* 430 U.S. 983 (1977), both the tribe and a county sought to impose a possessory interest tax on non-Indian lessees leasing land from the tribe. The Court, in response to a contention that the state's possessory interest tax impaired the ability of the tribe to levy its tax stated:

> "There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. The tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power." 543 F.2d at 1258.

*Accord, Mescalero Apache Tribe v. O'Cheskey,* 439 F.Supp. 1063 (D. N.Mex. 1977). *See also, Aqua Caliente Band of Mission Indians v. County of Riverside,* 442 F.2d 1184 (9th Cir. 1971), *cert. denied,* 405 U.S. 933 (1972); *The Ute Indian Tribe v. State Tax Commission,* 574 F.2d 1007 (10th Cir. 1978), *cert. denied,* 99 S.Ct. 452 (1978).

In sum, the legal basis for the State's claim that it may impose its tax on non-Indians purchasing cigarettes from tribal retailers is nothing more than the simple exercise of the state's sovereign power to tax its own citizens with respect to economic transactions carried on within the state's borders. The fact that the economic transaction in question—the purchase and consumption of cigarettes—occurs on an Indian reservation presents no barrier to the exercise of the state's power. *Thomas v. Gay,* 169 U.S. 264 (1898). The fact that an Indian tribe taxes the same transaction—directly or indirectly—similarly presents no barrier to the exercise of the state's power. *See Graves v. New York,* 306 U.S. 466 (1939); *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976).



The district court majority nevertheless would deny the State this sovereign power over its own non-Indian citizens. The court perceived a conflict between state and tribal taxing power as applied to non-Indians purchasing cigarettes from reservation-based Indian retailers, and resolved this conflict in favor of tribal taxing power.

In the remaining portions of its argument on this issue, the State will show that in reality no such conflict exists and that, even assuming a conflict, its resolution does not require stripping the state of its historically exercised sovereign power over its non-Indian citizens. This was the approach adopted by this Court in *Moe;* and it should be the approach adopted in this appeal.

### C. A State Tax Imposed on Non-Indians Purchasing Cigarettes From Tribally-Licensed Reservation Retailers Does Not Infringe on the Right of "Tribal Self-Government", Even Where the Tribe Imposes a Tax on the Same Transaction.

#### 1. The Right of Tribal Self-government Includes Only the Right of the Tribe to Pass and Enforce Laws Governing the Affairs of Tribal Members; It Does not Include the Right to Market a Tax Exemption to Non-Indians.

The Yakima Tribe's cigarette tax ordinance imposes a "permit fee" of 22.5¢ per carton of cigarettes sold or distributed to the Tribe's licensed retailers. *See* §4, Tribal Ordinance, A.209. Because the tax is not required to be passed on to the ultimate consumer, its legal incidence falls upon the tribal retailer. *See United States v. Mississippi Tax Comm'n,* 421 U.S. 599 (1975).

Thus, in the *Yakima* case, the Tribe is taxing its own members with respect to sales of cigarettes. The tribal tax does not reach non-Indians and, as we understand it, there is no claim by the Tribe that it does so.

In these circumstances, was the district court correct

in holding that the imposition of the State's tax on non-Indians purchasing cigarettes from the Yakima Tribe's licensed retailers constituted an unreasonable interference with tribal self-government?

Essentially, the district court held that the "right of tribal self-government" includes the right to market a tax exemption to non-Indians in order to raise revenues for tribal programs benefiting members of the tribe. The issue, therefore, is whether the right of tribal self-government includes such a power and, if so, whether state taxation of such non-Indian purchasers impermissibly interferes with that right. It is the State's position that the right of tribal self-government extends only to the right to control the internal relations between the tribe and its members and, furthermore, that a state tax imposed on non-Indians does not interfere with such rights.

First, the right of tribal self-government extends only to the right to control the internal relations of the tribe by prescribing laws applicable to tribal members and enforcing those laws in its own courts. A tribe has the power to determine tribal membership, *Red Bird v. United States*, 203 U.S. 76 (1906) ("Cherokee Intermarriage Cases"); to prescribe rules for the inheritance of property, *Jones v. Meehan*, 175 U.S. 1 (1899); and to regulate domestic relations among tribal members, *Fisher v. District Court*, 424 U.S. 382 (1976); and "* * * the right to prescribe laws applicable to tribal members and to enforce those laws by criminal sanctions." *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

The "right of tribal self-government" reached perhaps its fullest expansion in *Williams v. Lee*, 358 U.S. 217 (1959). *Williams* involved the power of a state court to resolve a dispute between an Indian purchaser and a non-Indian seller arising out of a transaction occurring on the Navajo Indian Reservation. The Court held that to subject the Indian purchaser to state court jurisdiction would infringe upon the tribal right of self-government.



The Court characterized the right of tribal self-government to be "* * * the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220.

Noting that the Navajo tribal court had jurisdiction to resolve civil disputes between Navajos and non-Indians, the Court stated:

> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." 358 U.S. at 223.

In each of these cases, the central concern of the Court has been to protect the right of the Tribe to pass and enforce laws governing the affairs of *its members* on the reservation.

This concern has been manifested by forbidding a state to apply its laws, enforced in its courts, *to reservation Indians*, in situations where the Tribe could fairly claim an interest in having tribal law apply, *e.g., Fisher v. District Court, supra*. And in situations where both the tribe and the state could fairly claim an interest in having their respective laws apply *to reservation Indians*, the preference has been for tribal law. *Williams v. Lee, supra*. Even though this preference would result in tribal law being made applicable to non-Indians, it nevertheless is merely an adjunct to the exercise of a tribe's jurisdiction over its own members and clearly results from the central concern of shielding reservation Indians from state law.

The situation presented by this case is, however, fundamentally different. The State is seeking to apply its tax to *non-Indians;* not to reservation Indians. There is no conflict as to which set of laws will apply to reservation Indians—clearly it will be tribal law. Tribal members cannot possibly be subjected to state taxation.[48] Thus,

*Williams v. Lee* is inapplicable to the situation presented in this case because it is completely unrelated to the conflicts between tribal and state jurisdiction *over reservation Indians* which the *Williams* "infringement test" was designed to resolve.

Extending the "right of tribal self-government", as articulated in *Williams v. Lee*, to a tribal right to market an exemption from state law to non-Indians in order to derive revenues for tribal programs is wholly unwarranted. There is no doubt that Indian tribes have the right to tax their own members in order to raise revenues, but that right does not extend to shielding non-Indians from state law—whatever the salutary economic benefit to the Tribe. Indian Tribes simply have no legitimate governmental interest in providing a "tax haven" for the benefit of non-Indians.[49]

Thus, the district court made its first analytical error in assuming that the "right of tribal self-government" as articulated in *Williams v. Lee, supra*, included the right to market a tax exemption to non-Indians for purposes of raising tribal revenue for expenditure on tribal programs.

2. **The Tribe Has Failed to Demonstrate that**

[48]Arguably, the refusal of the Tribe or its members to collect the State's tax imposed upon non-Indian purchasers with respect to reservation sales would subject tribal members to state law. However, this does not infringe upon the right of tribal self-government. *Moe, supra.*

[49]As stated by Congressman Lloyd Meeds in his dissent to the Final Report of the American Indian Policy Review Commission:

> "* * * immunity-motivated conduct of non-Indians should *not* be immune from State law. Where transactions take place or take a particular form precisely because of hoped-for immunity to non-Indians, no tribal interest is truly implicated other than possible tribal desires to 'franchise' their immunities to non-Indians. But such 'interests' are not legitimate. Otherwise it would be possible for Indians to 'market' immunity from State law by inducing essentially non-Indian activities to relocate on the reservation and by coloring them with a mere form of Indian involvement." 1 Final Report of the American Indian Policy Review Commission, at 592 (1977) (Emphasis in original).



**Elimination of Cigarette Sales to Non-Indians as a Source of Tribal Revenues will Threaten the Self-governing Ability of the Tribe.**

Additionally, the court erred in finding an actual interference with tribal self-government. This error resulted not only from the court's misconception of the right of tribal self-government, but also from a misconception of the arguments and proof advanced by the parties.

To begin with, it is important to understand what is *not* in dispute is the *economic effect* of the imposition of both a state and a tribal tax upon the sale of cigarettes by a tribal retailer to a non-Indian. The Tribe's experts testified that the results of this "double taxation" would be to discourage, if not entirely eliminate the business of retailing cigarettes to non-Indians.[50] The State does not dispute this economic effect. Furthermore, the State does not dispute the fact that the inability of the Tribe to market a tax exemption will have a negative impact upon Tribal revenues available for expenditure on Tribal programs.

What the State is disputing, however, is the extent of this negative impact on the self-governing ability of the Tribe. No credible testimony exists on what the effect of this inability to market a tax exemption will have on the self-governing ability of the Tribe. No one claims that the Tribe will be unable to govern their members if they cannot raise revenues by selling cigarettes to non-Indians. The district court found that loss of this revenue source would result in depletion of the tribal tax base, destruction of the tribal cigarette enterprises, and elimination of essential revenues needed for tribally sponsored programs. (J.S. App. 37)

Each of these factual conclusions, however, ultimately begs the question of interference with the right of reservation Indians to make their own laws and be governed by them. *Williams v. Lee*, 358 U.S. 217 (1959).

[50]*See* Affidavit of Ronald L. Trosper (*Colville* case), A.125-129; Deposition of Cyril Herrmann (*Yakima* case), pp. 45-47, A.249-250.

The nature and extent of the Tribes' tax base, to the extent it includes sales to non-Indians, has nothing to do with the relation between the Tribe and its members. Similarly, the establishment of tribal enterprises designed primarily to cater to non-Indians has nothing to do with the relation between the Tribe and its members.

The reduction in revenues spent upon tribally-sponsored programs is an undeniable fact, but the *effect* upon these tribally-sponsored programs is uncertain, at best, and purely speculative in terms of its effect upon the self-governing ability of the Tribe. For example, during fiscal year 1976 (1975-1976) the Yakima Tribal Council supervised the expenditure of $11,992,039 in tribal funds for governmental and tribal programs (*Yakima*, Pre-trial Order, ¶5.12(2), A.178). During calendar year 1975, the total revenue to the Tribe from its tax and wholesaling enterprise was $270,408.24 (*Yakima*, Pre-trial Order, ¶5.11, A.177). Thus, only a little more than two percent of the Yakima Tribe's revenues expended on governmental and tribal programs were derived from its cigarette tax. Certainly, elimination of this revenue source could well reduce the amount of revenues that the Tribe could spend elsewhere, but it can hardly be said to *actually* threaten the self-governing ability of the Tribe.[51]

In short, imposition of the State's tax upon non-Indian purchasers, whatever the economic effects, has no demonstrable effect upon "tribal self-government". The Tribe is free to tax or not tax its own members as it sees fit; not a single tribal member is subject to the state tax. The effect upon the Tribe is far too remote and indirect to constitute an "actual interference" with tribal self-government. Certainly, the failure of the Tribe to demonstrate any such interference is grounds for rejection of their claim.

This is the view shared by other lower courts who

[51]In this connection, it should be noted that each Tribe in the *Colville* case has utterly failed to produce any evidence of inability to tax members or seek alternative sources of revenue.



have considered similar claims. In *Mescalero Apache Tribe v. O'Cheskey*, 439 F.Supp. 1063 (D. N.Mex. 1977), in response to the Tribe's argument that New Mexico's gross receipts tax imposed upon a contractor constructing a resort on the Tribe's reservation infringed on tribal self-government, the court stated:

> "There is no question that the imposition of the tax will have an economic effect upon the Tribe. Such taxes normally are 'passed on' to the purchaser. * * * The effect is to reduce monies the Tribe could spend well on other things, but this does not make the tax anything more than an indirect burden on the Tribe. *Thomas v. Gay*, * * * 169 U.S. 264 (1898) * * *; *see Aqua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied* 405 U.S. 933 (1972). It does not rise to the level of state infringement on the right of reservation Indians to make their own laws and be ruled by them. *See Williams v. Lee*, 358 U.S. 217 * * * (1959).
>
> "Nor does the enactment of gross receipts tax and licensing ordinances by the tribal council make improper the imposition upon the contractors of the state's gross receipts tax. It does not interfere with tribal self-government simply because the tribe and another entity may have the power to impose a tax in the same area. *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied* 430 U.S. 938 * * * (1977). While it may be true that the Tribe has the power to grant the privilege of engaging in business on the reservation, it is also true that the state has the power to tax business conducted in the state. The Mescalero Reservation is not located by itself on another planet. It is situated in New Mexico, and at the very least, the contractors were accorded benefits by and protection from the state as they went to and from the reservation." 439 F.Supp. at 1073 (citations omitted).

In sum, state taxation of non-Indians purchasing cigarettes from tribally-licensed retailers does not interfere with tribal self-government, even where the Tribe imposes a tax on the same transaction. The right of tribal self-government goes only to the right of the Tribe and its

members to make their own laws and be governed by them. Nothing in the state's tax scheme subjects tribal members to state law.[52] The mere fact that the Tribes will probably have to search elsewhere for an equally lucrative revenue source to enhance tribal programs is not grounds for vitiating the state's tax as applied to non-Indians. Indian tribes, in the exercise of their powers of self-government, simply have no recognized right to market a tax exemption to a state's non-Indian citizens.

3. **A State Tax on Non-Indians Purchasing Cigarettes from Tribal Retailers does not Interfere with Tribal Self-government, Even Where the Tribe Taxes the Same Non-Indian Purchaser.**

Unlike the tribal tax involved in the *Yakima* case, the legal incidence of the tribal taxes in the *Colville* case fall directly upon the non-Indian purchaser. For example, §8 of the Colville Tribe's tax ordinance, A.104 provides:

> "There is being levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes in the amount of three cents per package. The Council may levy an additional tax upon the distribution of cigarettes and other tobacco products as it deems desirable. The excise tax levied hereunder shall be a tax upon distribution of cigarettes and other tobacco products by the Tribes only and shall not constitute an assessment or license fee upon enrolled members of the Tribes doing business within the reservation or obtaining special rights or privileges.[53]
>
> "The excise tax levied hereunder shall be first a tax upon distribution of cigarettes and other tobacco products by the Tribes pursuant to Section 10 of this ordinance; provided, however, that failure to pay the tax at the time of such distribution shall not prevent

[52] *See* n. 48, *supra*, p. 68.

[53] The Lummi and Makah Ordinances are similar. *See* A.114 (Makah); A.121 (Lummi).



> tax liability from arising by reason of another taxable event. The excise tax levied hereunder shall be added to the retail price of tobacco products sold to the ultimate consumer."[54]

The answer to this question is the same as in the *Yakima* case. The Tribes have no recognized tribal right of self-government to market an immunity from state tax laws to non-Indians in order to raise revenue for tribally-sponsored programs. The fact that the Tribes in the *Colville* case seek to directly tax non-Indian purchasers for this purpose does not convert the tax into an accoutrement of tribal self-government. Surely, if the Yakima Tribe has no right to market a tax immunity to non-Indians by taxing its own members, the Tribes in the *Colville* case have no right to market such a tax immunity by taxing non-Indians.

Furthermore, the record in the *Colville* case is devoid of any evidence relating to the impact of the Tribes' inability to market a tax exemption upon the self-governing ability of the Tribe. There is no evidence as to the percentage of cigarette tax revenues expended on tribal programs. There is no evidence as to which — if any — tribal programs will be curtailed as a result of the loss of cigarette tax revenues derived from sales to non-Indians.[54]

For these reasons, a state tax on non-Indians purchasing cigarettes from tribal retailers does not interfere with tribal self-government, even where the Tribe taxes the same non-Indian purchasers.

4. **The Power of the State to Tax Non-Indians Purchasing Cigarettes from Tribal Retailers has not Been Preempted by Tribal Ordinances Taxing the Same Transactions.**

[54] The testimony of the Tribe's economic expert was limited to the economic effect of superimposing the State's tax upon the tribal tax. *See* Affidavit of Ronald L. Trosper, A.125.

(a) **Introduction.**

The district court held that the State's tax as applied to non-Indians purchasing cigarettes from tribal retailers had been preempted by passage of tribal ordinances taxing the same transaction. The court determined that the Tribes were exercising federally delegated powers in taxing non-Indians and that the state's tax would conflict with the exercise of this power. (J.S. App. 35). This is the most troublesome aspect of the court's opinion. For it would permit tribes, by the mere stroke of a pen, to divest the State of its sovereign power of taxation over its own non-Indian citizens. This holding goes far beyond any rulings of this Court and results in a fundamental reallocation of powers among states, Indian tribes and the federal government.

Before turning to the questions of whether there has been a delegation of federal power to the Tribes, and, if so, whether the State's tax conflicts with this federal power, it is useful to begin with an analysis of the source and purposes of federal power in this area. By so doing, it will quickly become apparent that the district court's analysis proceeded on a fundamentally wrong basis.

The source of federal authority over Indian affairs is found in the Commerce Clause, U.S. Const., Art. I, §8, cl. 3 and the treaty making power, U.S. Const., Art. II, §2, cl. 2. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 n. 7 (1973). Congress, in the implementation of these constitutional powers, has enacted numerous treaties and statutes defining the limits of state power over Indian tribes and their members. The overriding policy of Congress in enacting these treaties and statutes has been to secure to Indian tribes the power to govern themselves, free from state interference. *See Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 686-687 (1965).

This congressional policy is made applicable to the states through operation of the Supremacy Clause, U.S. Const., Art. VI, cl. 2. *Moe v. Confederated Salish &*



*Kootenai Tribes*, 425 U.S. 463, 481 n. 17 (1976). By definition, this power is vested exclusively in the federal government. It is not vested in Indian tribes as a matter of their inherent sovereignty. Thus, the proper analysis is that outlined by this Court in *McClanahan, supra*, 411 U.S. at 172:

> "* * * the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power."

The following analysis heeds the dictates of *McClanahan*. We will examine the applicable treaties and statutes — read against the background of the Indian sovereignty doctrine — and in so doing will show that state taxation of non-Indians purchasing cigarettes from tribal retailers conflicts with no treaty right or federal statute dealing with the affairs of reservation Indians. Thus, there is no basis for federal preemption.

(b) **The relevant treaties and statutes, construed against the backdrop of Indian tribal sovereignty, do not constitute federal preemption of the State's power to tax its non-Indian citizens purchasing cigarettes from tribal retailers.**

(i) **Indian tribes, in the exercise of inherent tribal sovereignty, have no power to tax non-Indians doing business on a tribe's reservation.**

An Indian tribe has no power to tax non-Indians as a matter of "inherent tribal sovereignty". Recently, this Court in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), explained the limits of a Tribe's sovereign power as follows:

> "Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States

> and announcing their dependence on the Federal Government. * * * [However,] Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status*'." *Oliphant, supra,* 435 U.S. at 208 (citation omitted).

Among those powers which are inconsistent with tribal status is the general power of taxation as applied to non-Indians. Such power is, of course, a central attribute of sovereignty. And Indian tribes are proscribed from exercising any powers of sovereignty over persons other than tribal members. In *Oliphant*, the Court noted that the limitation upon a Tribe's sovereignty "* * * amounts *to the right of governing every person within their limits except themselves*." *Oliphant*, 435 U.S. at 209, quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (emphasis in *Oliphant* original).

In *United States v. Wheeler*, 435 U.S. 313 (1978), the court further explained what aspects of tribal sovereignty had been withdrawn and what are retained.

> "[T]he internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. * * * [T]he sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. *The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.*" *Wheeler, supra,* 435 U.S. at 324-326 (Emphasis supplied).

The district court identified the case of *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) as standing for the proposition that Indian tribes have power to tax non-Indians. But *Iron Crow* and this Court's decisions cited therein — *Morris v. Hitchcock*, 194 U.S. 384 (1904) and *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) — do not support the tribal exercise of general taxing power over non-Indians as an



attribute of inherent tribal sovereignty. Rather, the cases stand for the proposition that an Indian tribe, in the exercise of *treaty powers* to exclude non-members of the tribe from the tribe's reservation without the permission of the tribe may impose terms in a nature of a license or permit fee upon which such permission will be granted.[55] *Morris v. Hitchcock*, 194 U.S. 384 (1904), involved a tribal ordinance of the Chickasaw Nation requiring non-members of the tribe grazing livestock on tribal lands to obtain a permit and pay an annual permit tax. The Supreme Court found that the Curtis Act, 30 Stat. 495, ch. 517 (1898), had authorized the continued existence of the permit tax system utilized by the Chickasaw Nation prior to 1898. The source of the tribe's power to establish the permit tax system was, however, its treaty power to exclude non-members of the tribe.

Similarly, *Buster v. Wright, supra,* involved a license tax imposed on the privilege of non-members doing business on the Creek Nation. The court found that various acts of congress between 1888 and 1901 had reaffirmed the treaty right which gave the tribe the authority to fix the terms upon which non-members of the tribe might conduct business within its territorial boundaries. The court held that "the payment of this tax is a mere condition of the exercise of this privilege * * *", 135 F. at 949.

Thus, none of the cases stand for the proposition that inherent tribal sovereignty is the basis of the power to tax non-Indians doing business on an Indian reservation. The cases only support the proposition that Indian tribes may impose certain conditions on non-Indians who desire to exercise the privilege of residing or doing business on the reservation. The cases uphold the concept of limiting entry under certain conditions through the use of licenses,

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[55] *Accord*, 1 Final Report of American Indian Policy Review Commission, 178 (1977). The Commission apparently reads *Iron Crow* as approving the power to tax non-Indians as a matter of inherent sovereignty. But *Iron Crow* cannot be so read. And even if it could be so read, it is not binding on this Court.

and a fee or tax accompanying the license. This power is not unlike the power of any land owner to extract payments in various forms as a condition for the granting of a lease, profit or easement.

(ii) **State taxation of non-Indians purchasing cigarettes on an Indian reservation does not conflict with a Tribe's treaty right to exclude such non-Indians.**

As is apparent from the immediately preceding discussion, whatever powers tribes may have to tax non-Indians, it is clear that the source of this power is a treaty right to exclude non-members of the tribe from the Tribes' reservations.[56] *Morris v. Hitchcock, supra.* Because the Supremacy Clause prevents states from interfering with the exercise of treaty rights, the question then becomes whether state taxation of non-Indians purchasing cigarettes from reservation retailers interferes with the Tribes' treaty right to exclude.[57]

To state the question is to answer it. State taxation of non-Indians dealing with reservation Indians does not and cannot interfere with the Tribes' right to exclude these same non-Indians from the Tribes' reservation.

[56]The district court did not base its preemption analysis upon any treaty rights held by appellee Tribes. Consequently, it cited no treaty provisions which would arguably serve as a basis for taxing non-Indians. These treaty provisions exist, and are set forth in the Appendix to this brief. *See* Br. App. 3a (Yakima); Br. App. 1a (Lummi); and Br. App. 2a (Makah). We have been unable to identify any treaty right or federal enactment which affects the Colville reservation, however. Perhaps this is the reason the district court eschewed any analysis of the treaties. Because the state's tax does not conflict with the Tribes' treaty rights, it is not necessary to discuss the impact of subsequent federal legislation (*e.g.*, The General Allottment Act of 1887) "opening up" the Tribes Reservations for settlement by non-Indians, and the state takes no position on the issue.

[57]It is not necessary to discuss whether this "treaty right" is a "retained right" of the Tribes or whether it is a right conferred upon the Tribes by the United States. In neither case does the power of the State to tax non-Indians interfere with this right.



Whatever the requirements the Tribes may impose upon non-Indians as a condition precedent to entry on the Tribes' reservations (including the requirement of a "permit fee" or "tax") the fact of the matter is that these conditions are based upon the Tribes' power to exclude. Presumably, the Tribes' remedy for violation of these conditions (*e.g.*, non-payment of the tax) would be expulsion, with the aid of the United States, of non-Indians refusing to abide by such conditions. *See Morris v. Hitchcock, supra.*

State taxation of non-Indians dealing with reservation Indians does not conflict with the Tribes' right to exclude these same non-Indians. The State is not contending that it has the power to require the Tribes to sell cigarettes to non-Indians or otherwise admit them to their reservations. The State's cigarette and sales taxes here in question are general excise taxes, imposed upon non-Indians with respect to *their* use, possession, or consumption of cigarettes. RCW 82.24.020. These state taxes are in return for the privileges, opportunities and benefits afforded its non-Indian citizens by the State.

The Tribes' treaty right to condition the entry of non-Indians on their reservations does not carry with it a right to market a tax exemption for non-Indian citizens of the State of Washington. Nothing in this Court's decision in *Morris v. Hitchcock*, 194 U.S. 384 (1904) or, for that matter, the Eighth Circuit's decision in *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) leads to such a conclusion. Non-Indians doing business on the Tribes' reservation are subject to the jurisdiction of the State. *Thomas v. Gay*, 169 U.S. 264 (1898). Clearly, the State is entitled to tax its non-Indian citizens in return for the opportunities, protections, and benefits rendered by the State.

(iii) **State taxation of non-Indians purchasing cigarettes on an Indian reservation does not conflict with any federal legislation designed to**

**revitalize tribal self-government or foster tribal economic development.**

The district court identified several federal enactments designed to revitalize tribal self-government or foster tribal economic development which were urged upon it as a basis for federal preemption. The court rejected the argument that the Indian Traders Act, 25 U.S.C. §261 (1976), *et seq.* constituted federal preemption of a state's power to tax non-Indians (J.S. App. 29). The court further rejected the argument that enactments designed to revitalize tribal self-government or foster economic development, *e.g.*, the Indian Reorganization Act, 25 U.S.C. §476 (1976), *et seq.*, the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450 (1976), *et seq.*, and the Indian Financing Act of 1974, 25 U.S.C. §1451 (1976), *et seq.* supported a finding that the state's tax on non-Indians was federally preempted. As noted by the court (J.S. App. 30):

> "* * * The Supreme Court has never suggested that any of these statutes has of its own force established a policy of implied tax immunity for Indian tribes or those dealing with Indian tribes."

Indeed, insofar as tribal economic development is concerned, state tax immunity for Indian tribes and those with whom they deal is contrary to the intent of the Indian Reorganization Act. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), this Court refused to find in the IRA an implied exemption from state taxation for an Indian Tribe engaged in business outside the boundaries of the Tribe's reservation. The court quoted Representative Howard, one of the Act's sponsors, as follows:

> "The program of self-support and of business and civic experience in the management of their own affairs, combined with the program of education, will permit increasing numbers of Indians to enter the white world on a footing of equal competition." *Mescalero, supra,* 411 U.S. at 152.

If the intent of the IRA was to "* * * permit * * * Indians to enter the white world on a footing of



equal competition * * *", how is that served by providing the Indian with a huge competitive advantage over non-Indian cigarette retailers? It is not. In fact, the competitive advantage afforded Indian retailers by immunizing non-Indian purchasers from state taxation would tie the Indian retailer to the uncertain vagaries of a state tax policy favoring, at this time, a high rate of taxation on cigarettes. If the State were to abolish or drastically reduce its cigarette tax, what would the tribal retailer be left with? Nothing more than a stock of stale cigarettes and fond memories of the "good old days", we suggest. Therefore, implying a tax exemption in the IRA for non-Indian purchasers is at best a cruel hoax on the legitimate aspirations of Indian Tribes and their members for meaningful economic development on the Tribes' reservations.

We, of course, agree with the district court's finding in this regard. More importantly, we agree with the analysis employed by the district court. *None of these statutes have established a federal policy of providing non-Indians with immunity from state taxation when dealing with Indian tribes.*

How then did the district court find that passage of tribal ordinances afforded these non-Indians the precise immunity from state taxation which no federal enactments sanction? It is to this question which we now turn.

### (c) Section 16 of the Indian Reorganization Act of 1934 does not delegate to Indian Tribes the power to tax non-Indians purchasing cigarettes from tribal retailers.

The district court held that the Tribes were exercising federally delegated power in imposing their tax on non-Indians purchasing from tribal retailers. The court found this delegation in section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476 (1976), which, in the court's view, *delegated* to the tribes "* * * powers vested in any Indian tribe or tribal council by

existing law." And, according to the lower court, "[t]he power to tax Indians and non-Indians was one of those powers. *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956)." (J.S. App. 34) The lower court then found that imposition of the State's tax in addition to the tribal tax would frustrate "* * * the objectives of congress in making the delegation of power and of the tribe in passing the taxation ordinances for tribal usage * * *" (J.S. App. 35) Thus, the court reasoned that the State's tax had been preempted.

First, assuming that Congress has the power to tax non-Indians purchasing goods from Indians, there has been no affirmative delegation of this power to Indian tribes. Section 16 of the IRA does not grant to Indian tribes the power to tax non-Indians, but only recognizes that a constitution adopted by a tribe pursuant to the IRA may include "* * * all powers vested in any Indian tribe or tribal council by existing law." 25 U.S.C §476 (1976). In two recent cases decided by this Court, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *United States v. Wheeler*, 435 U.S. 313 (1978), the Court had occasion to comment upon the scope of the Indian Reorganization Act. In *Oliphant*, the Court stated that "the Indian Reorganization Act merely gives each Indian tribe the right 'to organize for its common welfare' and to 'adopt an appropriate constitution and bylaws.' * * *" *Oliphant, supra*, 435 U.S. at 195, n. 6. And, in *Wheeler*, again noting that the IRA merely authorized the tribe to adopt a constitution for self-government, the Court said that the act did not *create* the power of Indians to govern themselves and to punish crimes committed by their own members. *Wheeler, supra*, 435 U.S. at 327-328.

Thus, this Court has rejected the interpretation of the IRA as delegating the sovereign power of the United States to Indian tribes in favor of the obvious interpretation of the Act as merely facilitating the organization of tribal government for the regulation of the internal affairs of a tribe. Therefore, to the extent that the district court's



preemption analysis was predicated upon a finding that §16 of the IRA delegates taxing powers over non-Indians to the Tribes, the analysis is incorrect.

The court compounded this error by characterizing tribal power to tax non-Indians as a federally delegated power of *general taxation, i.e.*, a full exercise of a sovereign right to tax in order to raise revenue. The tribal power to tax non-Indians is not a federally delegated power — it is a treaty power. *See* pp. 78-79, *supra*. Furthermore, the power is not one of general taxation, but rather it is a limited power based upon a treaty right to exclude non-Indians from the Tribes' reservations.[58] And, as we have already demonstrated at pp. 78-79, *supra*, a state tax on non-Indians purchasing cigarettes from tribal retailers does not conflict with that power.

In sum, the district court arrived at its conclusion that Indian tribes could market a tax immunity to non-Indians by mistakenly assuming that §16 of the IRA delegated a federal power of general taxation to the Tribes.[59] That enactment, of course, does no such thing,

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[58]Characterizing the tribal power to tax non-Indians as a general power of taxation raises a number of troublesome questions about the rights of non-members of the Tribe paying a tax to a government in which that person has no right to representation. *See* 1 Final Report of the American Indian Policy Review Commission, 179-181, 595-596 (1977).

> "Such [tribal] taxation raises the question of the rights of a nonmember of the tribe paying a tax to a government in which that person has no right to representation. Governments generally, however, may tax noncitizens without regard to representation when they are within the territorial jurisdiction of that government. However, where non-Indians live within the boundaries of the reservation and have no hope of ever becoming members of the tribal government, the issue is more difficult." Commission Report, *supra*, p. 179

[59]This assumption, even if correct, provides no help to the court's result reached with respect to the Yakima, Lummi and Colville Tribes — none of which are organized pursuant to the IRA. Indeed, the Lummi and Colville Tribes specifically rejected the IRA, J.S. App. 33. If so, these Tribes rejected the purported delegation of federal taxing power.

and there is nothing in the history or purposes of the IRA which counsels otherwise.

Thus it is now understandable how the district court could find, on the one hand, that the policy underlying the IRA did not require state tax immunity for non-Indians dealing with reservation Indians and, on the other hand, find that a tribal exercise of purported IRA power required a finding of state tax immunity for the same non-Indians. With all due respect, the analysis ignores this Court's dictate in *McClanahan, supra,* 411 U.S. at 172, that it is the "* * * applicable *treaties* and statutes which define the limits of state power." (Emphasis supplied)

As a result, the district court ousted the State of its sovereign power to tax non-Indians going upon Indian reservations. Nothing in the history of this Court's decisions resolving conflicts between state and tribal jurisdiction requires such a result. In fact, this Court's decision in *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976), conclusively resolves the question in favor of state taxing power over non-Indians purchasing cigarettes from tribal retailers. It is to this argument which we now turn.

5. **This case is factually and legally indistinguishable from *Moe.***

Insofar as is relevant here, *Moe, supra,* involved an attempt by the State of Montana to require Indian retailers to collect and remit cigarette excise taxes, the legal incidence of which fell upon non-Indian purchasers. The Tribe had an ordinance which regulated the sale of cigarettes on the reservation. The tribal scheme was explained by the district court as follows:

> "The land is leased from the Tribes upon the Tribal Council's approval of the lessee's plan to erect a smoke shop. The Council controls the purchase of cigarettes for resale by Tribal members and charges an administrative fee in connection therewith." *Confederated Salish & Kootenai Tribes v. Moe,* 392 F.Supp. 1297, 1313 (D.Mont., 1975).



The primary purpose of the tribal scheme was to establish a "tax haven" for the benefit of non-Indian consumers seeking to avoid payment of a lawful tax to the state. As stated by the lower court in *Moe*:

> "It may reasonably be inferred that the stores were not established primarily for the benefit of Indian customers residing on the Reservation, but rather to sell cigarettes to prospective customers passing on the highway and others who come from neighboring communities to purchase cigarettes at a price substantially lower than the going price off the Reservation. The Indian seller profits from increased sales. The non-Indian purchasers avoid the payment of a tax legally imposed upon them." 392 F.Supp. at 1311.

The situation in the instant case is no different from that in *Moe*. The legal incidence of Washington's cigarette and sales taxes falls upon the non-Indian purchaser. The tribes, by ordinance, effectively control the sale of cigarettes to non-Indians on the reservation. The primary purpose of the tribal ordinances is to establish a "tax haven" for non-Indians seeking to avoid payment of the state's cigarette and sales taxes. Under these circumstances, the state's tax, as applied to non-Indians, is neither preempted by tribal ordinance nor infringes in any way upon tribal self-government.

First, as held by the district court, the legal incidence of Washington's cigarette tax falls upon the non-Indian purchaser (J.S. App. 23).[60] The basis of the district court's holding in this regard was its conclusion that the legislature intended the legal incidence of the tax to be imposed at the earliest constitutional opportunity. As stated by the court:

> "Where on-reservation tribal sales to non-Indians are involved, the first taxable event is, therefore, the use

[60]All parties concede that the legal incidence of the sales tax, chapter 82.08 RCW, falls upon the non-Indian purchaser. *See* RCW 82.08.050 (Br. App. 19a), which has been construed by the Washington State Supreme Court in *Murray v. State,* 62 Wn.2d 619, 384 P.2d 337 (1963) to place the legal incidence of the sales tax on the buyer.

> or consumption by the non-Indian purchaser. In such situations, the legal incidence falls upon the non-Indian purchaser rather than the tribal seller." (J.S. App. 23)

Thus, insofar as state taxing schemes are concerned, Washington's sales and cigarette tax are indistinguishable from the Montana cigarette tax involved in *Moe, supra.*

The Tribes' ordinances regulating and taxing the sale of cigarettes are equally indistinguishable from those involved in *Moe.* To recap, in *Moe,* the "smoke shops" were on trust land which was leased to members of the tribe for purposes of operating a retail cigarette business. The Tribe controlled the purchase of cigarettes for resale by tribal members and charged an administrative fee. However, the Flathead Tribe did not impose a "tax" on any cigarettes sold, whether to Indians or non-Indians.

Here, in the case at bar, the tribal smoke shops are located on trust or restricted status land. (*Colville* Pre-trial Order, ¶2.5, A.32; *Yakima* Pre-trial Order ¶5.7, A.173). The tribes control the purchase of cigarettes for resale by tribal members. (*Colville* Pre-trial Order ¶2.5, A.32; *Yakima* Pre-trial Order ¶5.7, A.173). Each Indian retailer is licensed by the Tribe to sell cigarettes. (*Colville* Pre-trial Order ¶2.5, A.32; *Yakima* Pre-trial Order ¶5.7, A.173). In the *Colville* case, the tribes claim to be in the "retail" business, retaining title to the cigarettes until sold to the ultimate consumer (*i.e.*, non-Indian).[61] The Yakima Tribe occupies the position of a wholesaler to its tribally-licensed retailers. (*Yakima* Pre-trial Order ¶5.7, A.173).

[61]However, this claim is largely illusory. In practical operation and effect the Colville and Lummi Tribes act as "wholesalers" to their respective tribal licensees. As detailed in the pre-trial order, ¶2.5, the relationship between the Tribe and its licensed retailers is described in part as follows:

> The Colville and Lummi Tribes furnish the operators of their tribal tobacco outlets only with cigarettes and tobacco products pursuant to their tribal ordinances. The operators themselves are required to furnish working capital and pay all business expenses. As remuneration for managing a tribal tobacco outlet, each operator is entitled to retain the gross revenue derived from sales of cigarettes and tobacco products in excess of the wholesale distribution price and excise tax levied by the respective tribe."



In the *Colville* case, the Tribes do not charge an "administrative fee" as such to cover their wholesaling expenses. However, the wholesaling price charged by the Tribes to their licensed retailers includes all expenses incurred by the Tribes.[62] Each of the Tribes imposes a tax on the "distribution" of cigarettes, collected at the time the cigarettes are distributed to the licensed retailer. (*See, e.g.*, Colville Ordinance, section 8, A.107). The tax is to be added to the retail selling price and passed on to the consumer. (*See, e.g.*, Colville Ordinance, section 8, A. 107).

In the *Yakima* case, the Tribe imposes a "permit fee" on the licensed retailers with respect to each package of cigarettes sold. Section 4 of the Yakima Ordinance (A.209) provides:

> "Section 4. A tribal permit to sell or distribute cigarettes under this resolution shall be twenty-five dollars ($25.00) annually and a permit fee of two and one-quarter cents (2¼ cents) per package of the smallest container of cigarettes sold or distributed. Tender of the initial permit fee shall be made at the time of application and other permit fees shall be paid at the time of each and every delivery of cigarettes."

In sum, insofar as the Tribes' involvement is concerned, there is no meaningful distinction between the four Tribes involved in this case and the tribe involved in the *Moe* case. Each Tribe acts as a wholesaler to its licensed retailers. The Yakima Tribe charges a "permit fee" to its retailers just as the tribe in *Moe* did. Although

[62]This follows from the definition of "wholesale distribution price" contained in section 2 of each of the Tribes' ordinances:

> " 'Wholesale distribution price' shall mean the price paid for each tobacco product by the tribes together with all freight charges and other expenses incurred by the tribes in their receipt and distribution." (A.106 [Colville Ordinance]; A.120 [Lummi Ordinance]; A.113 [Makah Ordinance]).

the Tribes involved in the *Colville* case did not charge a "permit fee" or "administrative fee" the net effect of its "tax" is exactly the same. The "permit fee" of 2¼ cents per package imposed by the Yakima Tribe is as much a "tax" as the 4 cents per package "tax" imposed by the Colville Tribe or vice versa. Even assuming that there is a meaningful distinction between a "tax" and an "administrative fee", it must be remembered that we are talking abut a conflict between the *power* of a tribe and the state to impose a tax. Therefore, whether a tribe chooses to exercise its taxing power by means of an "administrative fee" as in *Moe* and the *Yakima* case, or through a "tax" as is the case with the tribes involved in the *Colville* case, it is irrelevant to a resolution of the conflict involving the exercise of the taxing power. In short, if Montana's tax was not preempted by the Flathead Tribes' "administrative fee" there is no reason why Washington's cigarette tax should be preempted by the Tribes' "tax" or "permit fee".

Third, in both *Moe* and the instant case, the tribal scheme was designed to create a "tax haven" by attracting non-Indian purchasers seeking to escape the imposition of the state's tax. In *Moe*, the district court found that "it is the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption." 392 F.Supp. at 1308. As this Court noted in *Moe:*

> "Since nonpayment of the tax is a misdemeanor as to the retail purchaser, the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax. Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked." *Moe, supra,* 425 U.S. at 482 (footnote omitted).

Here, nonpayment of the tax by non-Indian purchasers constitutes a gross misdemeanor under Washington law. RCW 82.24.110.[63] The competitive advantage which the Indian retailer enjoys over non-Indian retailers is sufficient to attract non-Indian customers from as much as 40 miles away, seeking to avoid payment of the state's tax.[64] For example, the competitive advantage enjoyed by the licensed retailers of the Yakima Tribe amounts to $1.05 per carton of cigarettes.[65] This price differential is



[63]RCW 82.24.110 provides in pertinent part as follows:

"Each of the following acts is a gross misdemeanor and punishable as such:

* * *

"(4) To violate any of the provisions of this chapter;

"(5) To violate any lawful rule or regulation made and published by the department of revenue;

* * *

"(11) For any person to receive in this state any shipment of any of the articles taxed herein, when the same are not stamped, for the purpose of avoiding payment of tax. It is presumed that persons other than dealers who purchase or receive shipments of unstamped cigarettes do so to avoid payment of the tax imposed herein."

[64]Dr. Cyril C. Herrmann, the Yakima Tribe's economic expert, in explaining why requiring the Tribe to collect the State's cigarette and sales tax would put tribal smoke shop operators out of business explained as follows:

> "Now by the time I got clear over to visit with Holt-Brewer on the eastern side of the reservation I found another kind of demand elasticity problem. His customers drive from the Tri-Cities, which is some 40 miles southeast of his smoke shop. And so, he simply isn't able to charge $3.80 a carton. And he told me that his average carton of cigarettes goes at $3.60 a carton. But more than that, the people in the Tri-Cities will go together. And so you'll have, if you will, pooled purchases. In other words, there would be four or five neighbors or friends and they'll all place their order. And then a single automobile will make that drive. And so the average size of sale, therefore, will also be larger. Holt-Brewer would sell six cartons, ten cartons or even more than ten cartons." (Deposition of Cyril C. Herrmann, *Yakima* case, pp. 23-24).

Dr. Herrmann later testified that in fact the average sale at the Holt-Brewer smoke shop was *twenty cartons of cigarettes.* (Herrmann Deposition, A.234).

[65]The average price of a carton of cigarettes sold by a tribal retailer to a non-Indian purchaser is $3.95 per carton; the average price of a carton of cigarettes sold by a non-Indian retailer to a non-Indian is $5.00 per carton. (*Yakima* Pre-trial Order, ¶5.22, A.185).

due almost entirely to differences in tax liability. (*Yakima* Pre-trial Order, ¶5.22, A.186).

The non-Indian purchaser avoids the state's $1.60 cigarette tax and the $.25 sales tax ($.05 x $5.00). In return, the Tribe acquires its tax and the licensed retailer reaps a profit limited only by what the market will bear.

The Tribes' economic experts testified that it is the Tribe and their retailers who are bearing the economic burden of the State's tax. This is similar to the argument advanced by the Tribes in *Moe, supra,* to the effect that the Indian retailer was being taxed because he suffered a "measurable out-of-pocket loss". *Moe, supra,* 425 U.S. at 481. But, just like in *Moe,* the economic testimony ignores the fact that it is the non-Indian consumer who reaps the benefit of the tax exemption. Whatever economic burden the Tribe and its retailers may bear is simply a burden resulting from being unable to market a tax exemption to non-Indian consumers. *Moe* tells us that no such right to market a tax exemption exists.

In sum, the factual situation in the instant case is indistinguishable from that presented in *Moe.* In each case, the legal incidence of the state's tax fell upon non-Indian consumers. In each case, the Tribe imposed an "administrative fee" or "tax" — call it what you will, the legal and practical effect is the same — on the sale of cigarettes to non-Indian consumers. And in each case, it is the non-Indian consumer who reaps the benefit of the tax exemption. Under these circumstances, this court in *Moe* found that imposing a collection responsibility on Indian retailers did not contravene federal law and did not interfere with tribal self-government.

The same is true with respect to the State's power to impose its tax on its own non-Indian citizens purchasing cigarettes from tribally-licensed vendors. Certainly, if this Court sanctioned the direct application of state law to reservation Indians in the situation presented in *Moe,* it should sanction a direct application of state law to non-Indians in this case. The lesson to be derived from



*Moe* is simply that Indian Tribes have no legitimate right to market their immunity from state law to non-Indians. In circumstances where non-Indians seek to clothe themselves with such tribal immunity, a state may not only deny that immunity to non-Indians, but also require the Tribes and their members to assist the state in assuring that violations of state law do not go unchecked.

That is all the State asks in this appeal.

## IV. A STATE MAY IMPOSE UPON AN INDIAN TRIBE AND/OR ITS LICENSED INDIAN RETAILERS THE OBLIGATION TO COLLECT STATE EXCISE TAXES IMPOSED UPON THEIR SALES OF PERSONAL PROPERTY TO INDIAN PURCHASERS OTHER THAN MEMBERS OF THE TRIBE OCCUPYING THE RESERVATION, WHERE THE LEGAL INCIDENCE OF THE TAX FALLS UPON THE INDIAN PURCHASER, DESPITE THE FACT THAT THE TRIBE HAS ADOPTED ORDINANCES TAXING THESE SAME TRANSACTIONS.

### A. INTRODUCTION.

This portion of our brief involves the question of whether an Indian has a right to be free from state taxation when he or she resides on an Indian reservation other than that of his or her own Tribe. The issue is raised only in the *Yakima* case.

Under Washington law, reservation Indians are exempt from state cigarette and sales taxation only where the purchase takes place on the reservation of the tribe to which the Indian belongs. *See* Washington Administrative Code (WAC) 458-20-192 (Br. App. 38a) which, in dealing with tax liability of Indians, states in part:

> "For purposes of this rule, with respect to determining tax liability regarding any economic transaction or activity, the term 'Indian tribe' includes only an Indian tribe upon and within whose Indian reservation such transaction or activity occurs, and the term 'Indian' includes only a person duly registered on the

tribal rolls of the Indian tribe upon and within whose Indian reservation such transaction or activity occurs."

The district court held, *inter alia*, that the state is without power to tax reservation Indians who are not members of the tribe occupying the reservation (J.S. App. 54-55). In so doing, the court relied upon the opinion of the district court in *Confederated Salish & Kootenai Tribes v. Moe*, 392 F.Supp. 1297, 1312 (D. Mont. 1975). However, the issue of state taxing power over Indians who are not members of the reservation tribe was not before this Court on appeal in *Moe, supra*, and this Court expressed no opinion as to the lower court's holding. *See Moe, supra*, 425 U.S. at 480, n. 16.[66] Accordingly, the state regards this issue as still open.

### B. STATE TAXATION OF RESERVATION INDIANS WHO ARE NOT MEMBERS OF THE TRIBE UPON WHOSE RESERVATION THE TAXABLE TRANSACTION OCCURS IS NOT PREEMPTED BY FEDERAL LAW AND DOES NOT CONSTITUTE IMPERMISSIBLE INTERFERENCE WITH THE RIGHT OF TRIBAL SELF-GOVERNMENT.

#### 1. Federal preemption.

The question here is whether the federal government has preempted the field with regard to state taxation of Indians who have left their own reservations. This question must be decided with reference to the particular treaties and federal statutes which define the limits of state power over Indians. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). And, of course, absent clear statutory guidance courts will not imply tax

[66]"The District Court noted two further distinctions within its ruling. It extended its holding to sales of cigarettes to Indians living on the Flathead Reservation irrespective of their actual membership in the plaintiff Tribe. The State has not challenged this holding, and we therefore do not disturb it. * * *" *Moe, supra*, 425 U.S. at 480, n. 16.



exemption. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

Here, the district court cited no treaty rights or federal statutes in support of its holding that Indians who are not members of the tribe are entitled to exemption from state taxation. Rather, it relied solely upon the district court's holding in *Confederated Salish & Kootenai Tribes v. Moe*, 392 F.Supp. 1297 (D. Mont. 1975) wherein that court, apparently relying on *McClanahan, supra*, and *Mescalero, supra*, held that the Montana cigarette tax could not be imposed on sales to Indians who are residents of the Flathead Reservation, irrespective of tribal membership.[67]

*McClanahan* involved an income tax imposed upon a member of the Navajo Tribe residing on the Navajo Reservation where the income was derived entirely from reservation sources. That case thus obviously provides no basis for holding that a state may not tax Indians who are *not* members of the reservation tribe. And *Mescalero* involved a state tax imposed on the tribe operating a business off the reservation. Thus it too provides no basis for a holding that a state may not tax Indians who are not members of the reservation tribe. Therefore, to the extent that the district court here relied upon the district court in *Moe, supra*, in ruling to the contrary, there is no basis for its decision.

It is true that other lower courts which have considered the problem have generally held that Indian tax immunities apply to Indian people who reside on the reservation but are not enrolled members of the tribe occupying the reservation. *See, e.g., Fox v. Bureau of Revenue*, 87 N.M. 261, 531 P.2d 1234 (1975), *cert. denied*, 424 U.S. 933 (1976); *Dillon v. State of Montana*, 451 F.Supp. 168 (D. Mont. 1978). The rationale for these

[67]The lower court seemed to say that, for the very same reasons Montana could impose its cigarette excise tax and require pre-collection on sales to non-Indians, the state could not impose its taxes upon reservation Indians who were not members of the tribe. See, *Moe*, 392 F.Supp. at 1307, n. 19.

decisions is that federal statutes authorizing federal court jurisdiction over crimes committed by Indians on another tribe's reservation (e.g., 18 U.S.C. §1153) and the definition of "Indian" for purposes of the Indian Reorganization Act (25 U.S.C. §479), both manifest congressional power over Indians whether or not on their own reservations. The State, however, does not dispute that congress has assumed jurisdiction for certain purposes over Indians residing on another tribe's reservation. Indeed, congress has assumed jurisdiction over Indians not residing on any reservation. *See, e.g., Morton v. Ruiz*, 415 U.S. 199 (1974) in which the Court construed 25 U.S.C. §13 (1970), dealing with expenditures by the Bureau of Indian Affairs for general assistance to Indians, to encompass and authorize the expenditure of federal funds for non-assimilated needy Indians residing *on or near* an Indian reservation. To be sure, the United States does have an interest in individual Indians and may shield them from state powers wherever they reside. But the question is whether Congress has truly done so in this case.

Clearly, federal criminal jurisdiction over Indians committing crimes on another tribe's reservation (18 U.S.C. §1153 (1976)) affords no basis for automatically shielding those Indians from state taxing power. The "Major Crimes Act", 18 U.S.C. §1153, is a "limited" congressional intrusion into the internal affairs of tribes. The act was based upon congressional conviction that many Indians would be civilized sooner by being subjected to federal criminal law and taught to respect life and property of others. *Keeble v. United States*, 412 U.S. 205 (1973). Its purpose was not to shield Indians from state jurisdiction. Furthermore, it is not at all clear that non-members of the reservation tribe are subject to the Major Crimes Act. Members of terminated tribes are not so subject. *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974). And this Court has recently specifically reserved the question. See, *United States v. Antelope*, 430 U.S. 641, 646, n. 7 (1977).



Similarly, the fact that such Indians fit within the definition of "Indian" for purposes of the Indian Reorganization Act does not require a conclusion that such Indians are thereby exempt from state taxing power. *Cf. Mescalero Apache Tribe v. Jones, supra.* And clearly, there is no specific federal legislation exempting, expressly or by implication, Indians not residing on their own reservation from the reach of state taxing power. Absent clear statutory guidance we submit that this Court should hold that there is no such tax exemption. *Mescalero Apache Tribe v. Jones, supra.*

2. **Tribal self-government.**

The considerations defining the limits of state power over Indians who are not members of the tribe upon whose reservation they reside are grounded in the history of congressional policy fostering tribal self-government — and not any generalized notions of the guardian-ward relationship or the "policy of fostering Indian economic self-development". As explained in *McClanahan, supra*, 411 U.S. at 170:

> "Thus, only a few years ago, this Court struck down Arizona's attempt to tax the proceeds of a trading company doing business within the confines of the very reservation involved in this case. See *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965). The tax in no way interfered with federal land or with the National Government's proprietary interests. But it was invalidated nonetheless because 'from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference.'"

The *McClanahan* decision then went on to quote with approval the following statement in U.S. Dept. of Interior, FEDERAL INDIAN LAW, 845 (1958):

> "State laws generally are not applicable to *tribal* Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on

an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress." (Emphasis supplied) 411 U.S. at 170-171.

The crucial point here is that federal preemption of state tax power, insofar as it applies on Indian reservations, applies only to *"tribal Indians"* on the reservation. State taxation of non-members of the tribe does not, and cannot, interfere with tribal self-government for the simple reason that those Indians are neither constituents nor subject to the jurisdiction of the revervation tribe. Those Indians stand on absolutely no different footing with respect to the reservation tribe than does a non-Indian residing on the reservation. Unless the tribes are somehow willing to concede that Indians who are not members of the tribe have some say, by vote or otherwise, in tribal affairs—or somehow could share in tribal allotments or disbursements, it is clear that taxation of those non-members of the tribe does not amount to interference with tribal self-government. Furthermore, state taxation of those Indians in the face of tribal taxation does not amount to an interference with "tribal self-government" any more than does state taxation of non-Indians. See, pp. 65-73, *supra*.

In conclusion, there is no established federal policy permitting Indians who are non-members of the tribe to purchase tax free cigarettes. State taxation of these Indians who, after all, are citizens of the state and recipients of the opportunities, protections and benefits afforded all state citizens, does not conflict "with any congressional enactment dealing with the affairs of reservation Indians, *United States v. McGowan*, 302 U.S. 535, 539 (1938)," or "frustrates tribal self-government, see *Williams v. Lee*, 358 U.S. 217, 219-220 (1959)." *Moe v. Salish & Kootenai Tribes*, 425 U.S. at 483.

## V. A STATE MAY IMPOSE UPON AN INDIAN TRIBE AND/OR ITS LICENSED INDIAN RETAILERS MAKING SALES ON THE RESERVATION TO NON-INDIAN PURCHASERS, NONDISCRIMINATORY REPORTING AND AUDITING REQUIREMENTS DESIGNED TO INSURE THAT TAXES COLLECTED ON SALES TO NON-INDIANS ARE PROPERLY ACCOUNTED FOR.



### A. INTRODUCTION.

This appeal also presents several tax enforcement issues, including the power of the state to impose various reporting and auditing requirements to insure tax collection. This Court in *Moe, supra*, as did the district court in *Moe*, declined to pass on any "enforcement issues" pending determination of the liability for collection of state excise taxes imposed upon non-members of the tribe. See, *Moe, supra*, 425 U.S. at 468, n. 6. This issue is present in both the *Colville* and *Yakima* cases.

At the outset, a brief statement of the purposes and methods by which the state seeks to enforce the collection of cigarette and sales taxes on sales by reservation Indians to non-members of the Tribe would be helpful to a more complete understanding of the problem. The purposes of the enforcement scheme are self-evident: first, assuring that retail taxes are in fact charged and collected by retailers and second, assuring that the taxes, once collected, are properly accounted for and remitted to the state.[68] The former consideration is practically self-enforcing, in the sense that if a retailer is not collecting sales tax his competitors soon get wind of the fact and report it to the state. The latter consideration, is, however, not self-enforcing and consequently calls for substantial state control in order to assure that a retailer is not pocketing a portion of the taxes he has collected on behalf of the state.

**1. Sales Tax Record Keeping Requirements.** In order to guard against the possibility of retailers (whether Indian or non-Indian) attributing sales to

[68]See generally, Washington Administrative Code section 458-20-192, and Excise Tax Bulletin 504.08.192; Br. App. 38a-44a.

non-Indians as sales to Indians (and thus tax free), the state has adopted a series of requirements covering registration and record keeping. These requirements are contained in Excise Tax Bulletin No. 504.08.192 (Br. App. 42a). Pursuant to this ETB, licensed retailers of the Tribe are required to register with the state (without payment of the registration fee) in order that the state will know who is operating the business and what its address is. All retailers are required to keep certain records documenting the tax exempt status of sales to reservation Indians. The following records are required to be kept by all retailers, including the Tribes and their licensed retailers, where such persons make sales to reservation Indians:

(a) Name of the Indian purchaser,

(b) The tribal affiliation of the purchaser,

(c) The Indian reservation to which or within which delivery was made, or within which retail services were rendered,

(d) The dollar amount of the sale and

(e) The date of the sale.

Requirements (a), (b), and (c) are designed to insure that an "audit trail" is available to permit the State to verify that the sale in fact was a valid tax-exempt sale, i.e. a sale to a reservation Indian. This information would permit the State to check, on a random basis, with the purchaser to verify the fact of purchase. Requirements (d) and (e) are designed to establish an "audit trail" permitting verification of the total dollar amount of tax exempt sales claimed by retailers. Without these requirements, as is implicit in the fact of their adoption, the State Department of Revenue is concerned that wholesale tax avoidance or fraud could be perpetrated with impunity upon the State. And, of course, it is the people of the State and the vast majority of honest retailers who would suffer the consequences.

2. **Cigarette Tax.** The foregoing record keeping requirements to not apply to the cigarette excise tax on retail sales of cigarettes to non-Indians. Rather the state cigarette tax, as was Montana's tax in *Moe*, is enforced by



the "stamp" method. Under this method, wholesalers or retailers purchase stamps from the State Department of Revenue (and pay the cigarette tax) and affix these stamps to individual packages of cigarettes prior to the time of sale. RCW 82.24.030 (Br. App. 22a)[69]

However, no stamps are required to be affixed in the case of sales of cigarettes by Indian tribal organizations to their members. RCW 82.24.050[70] permits Indian tribes to retain unstamped cigarettes "intended for sale to qualified purchasers". The term "qualified purchasers" is limited to enrolled members of the tribe making the sale, including those members who reside off the reservation. This follows from RCW 82.24.260[71] which exempts from the duty of collecting the tax "a federally recognized Indian tribal organization with respect to sales to enrolled members of the tribe * * *" Reading RCW 82.24.050 and 82.24.260 *in pari materia*, the statutory pattern indicates that Indian tribal organizations are permitted to possess unstamped cigarettes (RCW 82.24.050) and to make sales to enrolled members of the tribe without collecting the tax (RCW 82.24.260). Further, in view of the holding in *Tonasket v. Washington (Tonasket II), 84 Wn.2d 164, 525 P.2d 744 (1974), appeal dismissed,* 420 U.S. 915 (1975), the statutory exemption from affixing stamps extends to *individual Indian retailers* licensed by the tribe with respect to sales to enrolled members.

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[69]RCW 82.24.030 (Br. App. 22a) provides in pertinent part as follows:

> "In order to enforce collection of the tax hereby levied, the department of revenue shall design and have printed stamps of such size and denominations as may be determined by the department, such stamps to be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the department to readily ascertain by inspection, whether or not such tax has been paid. Every person shall cause to be affixed on every package of cigarettes on which a tax is due, stamps of an amount equaling the tax due thereon before he sells, offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same * * *."

[70]Br. App. 24a.

[71]Br. App. 26a.

Indian retailers making sales to non-Indians, however, are still required by statute to affix stamps. RCW 82.24.260, *supra*, merely provides that if a retailer sells unstamped cigarettes he is to collect the tax and remit it at the same time and in the same manner as the retail sales tax. The statute specifically provides that the duty of the retailer (imposed by RCW 82.24.050) to affix stamps is not affected. Accordingly, the statutory scheme for enforcing the cigarette tax on sales by reservation Indians to non-Indians requires that stamps be affixed prior to the time of sale.

In light of the difficulties with Montana's scheme of "pre-collection" by means of stamps noted in *Moe*, 425 U.S. at 468, n. 6, it should be emphasized that Washington's cigarette tax stamping scheme does not require "pre-collection" on sales of cigarettes by reservation Indians to non-Indians. First, there is no statutory requirement that persons who acquire cigarette stamps from the Department pay for such stamps upon receipt. Indeed, a departmental regulation, WAC 458-20-186[72] provides for deferral of payments for a 30-day period for cigarette vendors who furnish a surety bond to the Department equal to the estimated monthly supply of stamps or $2,500, whichever is greater. This applies to the Tribe and its licensed retailers. Second, the Tribe and its licensed retailers may purchase stamped cigarettes from wholesalers. Thus, "pre-collection" of Washington's cigarette tax by Indian retailers is not required.

### B. THE STATE MAY ADOPT AND ENFORCE REASONABLE RULES AND REGULATIONS TO ENFORCE STATE EXCISE TAX COLLECTION RESPONSIBILITY ON SALES OF CIGARETTES AND GOODS BY THE TRIBES AND THEIR LICENSED RETAILERS TO NON-MEMBERS OF THE TRIBE.

[72]Br. App. 34a.



Against the foregoing background of enforcement considerations, *Moe* tells us:

> "* * * to the extent that the 'smoke shops' sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof." *Moe, supra*, 425 U.S. at 483.

By adopting its record keeping and stamp requirements, this is all the State seeks to do. We know of no other meaningful way to *require* retailers to "add the tax to the sales price" other than to require the retailers to keep books and records documenting which sales are tax exempt and which are not; or, in the case of such a highly taxed item as cigarettes (which are easily concealed and highly mobile) to require stamps to be affixed prior to sale. Certainly, this Court, in approving the power of the state to require Indian retailers to collect the state's tax, must have intended to include reasonable requirements to assure that Indian retailers fulfill this requirement. To argue otherwise would vitiate completely the Court's holding in *Moe*. So long as the state requirements are reasonable, it follows that such requirements are applicable to Indian Tribes and their licensed retailers.

### C. THE REQUIREMENT THAT INDIAN RETAILERS KEEP RECORDS PERTAINING TO BOTH INDIAN AND NON-INDIAN SALES IS A REASONABLE REQUIREMENT AND IS NOT PREEMPTED BY FEDERAL LAW.

The district court held that the state's record keeping requirements as set forth in ETB 504.08.192, constituted a burden on Indian retailers not authorized by federal law, citing *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965) (J.S. App. 29-30). In *Warren*, the Court struck down Arizona's attempt to tax the income of a federally-licensed Indian trader derived from on-reservation sale of goods to Indians. The Court

found that this tax would constitute a burden upon the trader or the Indians with whom he deals in violation of the purposes and policies of the Indian Traders Act, 25 U.S.C. §261 (1976), *et seq.*

The lower court's reliance upon *Warren* is misplaced. First, the state is not here attempting to impose a tax upon Indian seilers with respect to any sales. Rather, the state is merely requiring Indian retailers to keep a record of their sales to Indians as an adjunct of the state's power to require Indian retailers to collect and remit taxes on sales to non-Indians.[73] The district court found that nearly 90% of the Tribes' sales are to non-Indians. (J.S. App. 7)

In these circumstances, the state's requirement that tribally-licensed retailers keep records of sales to reservation Indians is truly a "minimal burden". *Moe, supra,* 425 U.S. at 483. Certainly, requiring Indian retailers to keep detailed records of ten percent of their sales is much less burdensome than requiring them to keep track of ninety percent of their sales. Furthermore, it is a requirement that is reasonably necessary to assure that non-Indians dealing with reservation retailers to not escape their obligations to pay state taxes imposed upon them. Where Indian Tribes and their licensed retailers establish a scheme primarily for the benefit of immunizing non-Indians from their obligations under state law, the burden of record keeping—even as applied to sales to Indians—is a reasonable one. The "burden" infringes upon no legitimate tribal interest and conflicts with no federal law.

[73]The necessity for this requirement can be illustrated as follows: Assume that an Indian retailer in a given audit period makes total sales in the amount of $500,000; $300,000 of which represent sales to non-Indians and $200,000 of which represent sales to Indians. The retailer in fact collects the state's sales tax on all sales to non-Indians. However, the retailer only reports $100,000 in sales to non-Indians, thus retaining $10,000 ($200,000 x 5 percent) in sales tax collected—claiming that he made $400,000 in sales to Indians. Without access to any records dealing with sales to Indians, the state's tax auditor will be unable to verify the accuracy of the Indian retailer's tax return. Thus, the state's sales tax becomes the Indian retailer's "profit margin" and violation of this Court's collection requirement will go virtually unchecked.



## VI. ASSUMING THE STATE HAS THE AUTHORITY TO REQUIRE INDIAN TRIBES AND/OR THEIR LICENSED RETAILERS TO COLLECT AND REMIT TAXES ON THEIR SALES OF CIGARETTES TO NON-INDIANS, THE STATE MAY ENFORCE COLLECTION OF SUCH TAXES BY CONFISCATING AS CONTRABAND THOSE CIGARETTES WITHIN THE STATE WHICH ARE BEING SHIPPED IN INTERSTATE COMMERCE TO THE INDIAN TRIBE FOR ULTIMATE RESALE TO NON-MEMBERS OF THE TRIBE.

### A. INTRODUCTION.

Another "enforcement issue" presented to the district court in both the *Colville* and *Yakima* cases involves the power of the State to seize contraband cigarettes. In view of the district court's holding that the State's tax, as applied to non-Indians, had been federally preempted, the court did not reach this issue. However, the issue was fully briefed and argued below, and there is no reason to delay resolution of this important issue. Accordingly, the State feels constrained to fully brief the issue before this court.

1. **The Statutory Scheme.** Under Washington law, unstamped cigarettes moving in interstate commerce consigned to a person in the state are contraband unless the consignee is an authorized purchaser. RCW 82.24.250 (Br. App. 25a). An Indian Tribe can be an authorized purchaser if it is authorized by the state Department of Revenue to possess unstamped cigarettes. RCW 82.24.250, *id.* However, an Indian Tribe will not be authorized by the state Department of Revenue to possess unstamped cigarettes where sales of unstamped cigarettes to persons who are not enrolled members of the Tribe are taking place within the exterior boundaries of the Tribe's reservation. RCW 82.24.040 (Br.App. 23a).

2. **Tribal Action.** Unstamped cigarettes and tobacco products are purchased by the Tribes from out-of-state wholesalers and are shipped directly to the Tribe by licensed, bonded interstate carriers. (*Colville*

Pre-trial Order, ¶2.5, A.32-33; *Yakima* Pre-trial Order, ¶5.7, A.172-173). None of the Tribes have sought authorization from the state to possess unstamped cigarettes. And it is undenied that sales of unstamped cigarettes to non-Indians are taking place on the Tribes' reservations.

Accordingly, under state law, cigarettes being shipped to the Tribes from out-of-state wholesalers, to the extent that they are intended for ultimate resale to non-members of the Tribe, are classified as contraband and are subject to seizure and sale. The issue, then, is whether the state, in the exercise of its police power in aid of the taxing power, has the authority to seize and sell unstamped cigarettes while still in transit as contraband in enforcement of its cigarette excise tax statutes.

### B. THE STATE MAY CLASSIFY AS "CONTRABAND" UNSTAMPED CIGARETTES OWNED BY THE TRIBES AND INTENDED FOR ULTIMATE RESALE BY TRIBALLY-LICENSED RETAILERS TO NON-MEMBERS OF THE TRIBE, AND MAY SEIZE AND SELL SUCH CIGARETTES WHEN SUCH CIGARETTES ARE IN TRANSIT IN INTERSTATE COMMERCE.

At the outset, it is important to state what this issue does *not* involve. First, there is no claim that the seizure of unstamped cigarettes moving in interstate commerce destined for the Tribes for ultimate resale to non-members of the Tribe exceeds state statutory authority. Second, there is no claim that the procedures used by the state in seizing and selling unstamped cigarettes violates the due process clause of the United States Constitution. *See Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589 (1931).[74]

[74]These very same statutes have been upheld against a challenge under the Due Process Clause in *Matheson v. Kinnear*, 393 F.Supp. 1025 (W.D. Wash. 1975). That case involved seizure of unstamped cigarettes being sold by an Indian on trust land located outside the boundaries of an Indian reservation. The three-judge court in *Matheson* was comprised of the same members as in the instant case.



We turn now to the question of the state's power, in the exercise of its police power in aid of the taxing power, to classify as contraband and seize and sell unstamped cigarettes moving in interstate commerce to aid the enforcement of its cigarette excise tax statutes. The lower courts have uniformly upheld a state's power to seize cigarettes as contraband even though in the course of interstate commerce when the cigarettes are within the state contrary to state cigarette tax statutes. *State v. Sedacca*, 252 Md. 207, 249 A.2d 456 (1969); *Angelica Co. v. Goodman*, 52 Misc.2d 844, 276 N.Y.Supp.2d 766 (Sup. Ct. 1966); *People v. Asta*, 337 Mich. 590, 60 N.W.2d 472 (1953); *Commonwealth v. Flickinger*, 165 Pa. Super. 95, 67 A.2d 779 (1949), *aff'd*, 365 Pa. 59, 73 A.2d 652, (1950), *cert. denied, sub nom. Flickinger v. Commonwealth*, 340 U.S. 843 (1950); *People v. Locricchio*, 342 Mich. 210, 69 N.W.2d 723 (1955).

These cases are nothing more than an application of the general rule that states, in order to safeguard vital local interests, will be permitted to regulate interstate commerce if it does not unduly interfere with that commerce and is not in conflict with an area of regulation totally preempted by congress. As stated in *Freeman v. Hewit*, 329 U.S. 249 (1946):

> "* * * [I]n the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State." 329 U.S. at 253.

Here, it is clear that the state has a vital interest in preventing the diversion of untaxed cigarettes into the hands of its non-Indian citizens. Cigarettes are highly mobile, easily concealable, and — most importantly — highly taxed. In these respects, cigarettes are identical to intoxicating liquor. And this Court, in *Carter v. Commonwealth of Virginia*, 321 U.S. 131 (1944), has held that the Commerce Clause does not prohibit a state from requiring a carrier transporting intoxicating liquor to: (1) use the most direct route and have in its possession a bill of lading showing the route to be used; (2) post a bond; (3) have in its possession a bill of lading showing the name of the true consignee and also showing that *the consignee had a legal right to receive the intoxicating liquor at the stated destination.*

Washington statutes declaring unstamped cigarettes as contraband and providing for seizure and sale thereof, are clearly aimed at preventing tax evasion. The statutes do not prohibit cigarettes from being brought across the state line, but rather establish a procedure to insure that unstamped cigarettes are not diverted into the hands of non-Indians. Any effect upon interstate commerce which might possibly result from this scheme is merely incidental to the valid exercise of the police power of the state of Washington. To hold that Washington's contraband procedures violate the Commerce Clause would be to permit the wholesale avoidance of legally imposed taxes. This Court did not sanction that result in *Moe, supra*, and there is no reason for the Court to sanction that result here.

## VII. A STATE MAY LAWFULLY SEIZE AND LEVY UPON PROPERTY OF INDIAN TRIBES TO ENFORCE COLLECTION RESPONSIBILITY FOR STATE TAXES IMPOSED AGAINST NON-INDIAN PURCHASERS.

### A. INTRODUCTION.

This issue presents a slightly different problem from



the interstate commerce clause issue discussed in Part VI of the Argument portion of this brief. The state is here seeking to enter upon the Tribes' reservations and in the exercise of its police power in aid of the taxing power seize and sell so much of the Tribes' and/or the retailers' stocks of cigarettes which are intended for resale to non-members of the Tribe at locations on trust or restricted status land within the exterior boundaries of the reservation. This issue raises the question of the scope and extent of state police power over the Tribe and its members conducting activities with non-Indians on the reservation. The issue is present in both the *Colville* and *Yakima* cases.

### B. The State Enforcement Scheme.

(1) **Cigarette tax.** Unstamped cigarettes within the state, except those cigarettes being transported to Indian Tribes for resale to members of the Tribe, are declared contraband and are subject to seizure and sale. RCW 82.24.130. (Br. App. 24a)[75] Thus, to the extent that the Tribes' licensed retailers sell unstamped cigarettes to non-Indians, that portion of the stock of goods intended for sale is contraband and subject to seizure and sale under state law.

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[75]The statutory pattern is contained in RCW 82.24.130 and RCW 82.24.250, quoted in pertinent part as follows:

(RCW 82.24.130)

"Subject to the provisions of RCW 82.24.250, any articles taxed herein found at any point within this state, which articles shall be held, owned, or possessed by any person, and not having the stamps affixed to the packages or containers are hereby declared to be contraband goods, and may be seized by the department of revenue, or its duly authorized agent, or by any peace officer of the state, when directed by the department of revenue so to do, without a warrant, and said goods shall be offered by the department of revenue for sale at public auction to the highest bidder * * * ."

RCW 82.24.250 permits unstamped cigarettes to be transported to "a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state." That term includes "* * * any Indian tribal organization authorized to possess unstamped cigarettes." RCW 82.24.250. An Indian Tribe is not authorized to possess unstamped cigarettes "* * * when it appears that sales of unstamped cigarettes

2. **Sales tax.** The situation with respect to enforcement of the state's sales tax (chapter 82.08 RCW) is different. State law does not provide for seizure and sale of property as "contraband" where a seller either does not collect the tax or, once having collected the tax, fails to turn it over to the state. The remedy provided in state law for a person who collects the tax but fails to turn it over to the state is criminal: conviction for a gross misdemeanor. RCW 82.08.050 (Br. App. 19a). The remedy for failure to collect the tax is to assess the tax, in the state's discretion, against either the buyer or seller. RCW 82.08.050. But in the latter case, enforcing the tax against the seller is not taxing the seller, but rather is another exercise of the police power in aid of the taxing power. *See, Morrow v. Henneford,* 182 Wash. 625, 47 P.2d 1016 (1935); *Rainier National Park Co. v. Martin,* 18 F.Supp. 481 (W.D. Wash. 1937), *on rehearing,* 23 F.Supp. 60 (1937), *aff'd,* 302 U.S. 661 (1938); *Sherman-Reynolds, Inc. v. Mahin,* 47 Ill.2d 323, 265 N.E.2d 640 (1970).

### C. THE STATE MAY CLASSIFY AS "CONTRABAND" UNSTAMPED CIGARETTES OWNED BY THE TRIBES AND/OR THEIR RETAILERS AND INTENDED FOR ULTIMATE RESALE TO NON-MEMBERS OF THE TRIBE IN VIOLATION OF STATE LAW, AND MAY SEIZE AND SELL SUCH CIGARETTES IN THE MANNER PRESCRIBED BY STATE LAW WHERE SUCH CIGARETTES ARE HELD ON THE TRIBES' INDIAN RESERVATIONS.

First, it is clear that an Indian reservation is within the territorial jurisdiction of the state in which it is located and its residents (Indians and non-Indians) are citizens and residents of the state in which the reservation is

to persons who are not enrolled members of a recognized Indian tribe are taking place, or have taken place, within the exterior boundaries of the reservation occupied by that tribe." RCW 82.24.040.



located. *Organized Village of Kake v. Egan,* 369 U.S. 60 (1962).

The general rule with respect to state police power jurisdiction over Indian reservations is summarized in F. Cohen, FEDERAL INDIAN LAW, 117 (1942) as follows:

> "Thus, without questioning the constitutional doctrine that states possess original and complete sovereignty over their own territories save insofar as such sovereignty is limited by the Federal Constitution, a sense of realism must compel the conclusion that control of Indian affairs has been delegated, under the Constitution, to the Federal Government and that state jurisdiction in any matters affecting Indians can be upheld only if one of two conditions is met: either that Congress has expressly delegated back to the state, or recognizes in the state, some power of government respecting Indians; or that a question involving Indians involves non-Indians to a degree which calls into play the jurisdiction of a state government."

In *Moe,* this Court found that the state of Montana had jurisdiction over tribal retailers selling cigarettes to non-Indians for purposes of enforcing a collection responsibility with respect to taxes imposed on non-Indians. The Court found that this exercise of state jurisdiction did not conflict with federal law and did not frustrate tribal self-government. *Moe,* 425 U.S. at 483. The basis of the Court's holding was its perception that the Tribe and its enrolled members were involved with non-Indians to a degree which permitted the state to extend its police power onto the reservation.[76]

[76]An examination of the lower court's opinion in *Moe* clearly reveals the jurisdictional basis by which the state may exercise jurisdiction over reservation Indians. Analyzing the facts before it, the court stated, 392 F.Supp. 1297, 1311:

> "It may reasonably be inferred that the stores were not established primarily for the benefit of Indian customers residing on the Reservation, but rather to sell cigarettes to prospective customers passing on the highway and others who come from neighboring communities to purchase cigarettes at a price substantially lower than the going price off the Reservation. The Indian seller profits from increased sales. The non-Indian purchasers avoid the

Thus, fairly read, *Moe* stands for the proposition that where reservation Indians establish businesses within Indian country primarily to attract the business patronage of non-Indians, the effect of which is to encourage, aid, and abet non-Indians in avoiding state tax laws, the state may exercise its police power jurisdiction over reservation Indians to the degree necessary to prevent such wholesale violations.

To the extent that this results in subjecting reservation Indians to state court jurisdiction, it nevertheless does not interfere with "the right of tribal self-government" as articulated in *Williams v. Lee*, 358 U.S. 217 (1959). Although the Tribes do have a legitimate interest in protecting their members and their property from arbitrary confiscation and preserving the public peace on the reservation, this right is not absolute. Tribes have no legitimate governmental interest in aiding and abetting their members to induce non-Indians to violate state law. However unpalatable it may be to the Tribes and their licensed retailers, the clear import of *Moe* dictates that when the Tribes invite Washington's non-Indian citizens onto the reservation in this manner, they also invite the jurisdiction of the state, at least insofar as it is reasonably necessary to prevent wholesale violations of state law by non-Indian citizens.

Finally, it may very well be that this Court will find it unnecessary to rule on this aspect of the appeal. Hopefully, a mere declaration by this Court that the Tribes and their licensed retailers are required to collect and remit cigarette excise taxes and sales taxes imposed on non-members of the Tribe will be sufficient to cause compliance with the state's requirements and thereby obviate the necessity for more vigorous state enforcement.

payment of a tax legally imposed upon them.

"We conclude that under these facts the Indian seller in selling cigarettes to non-Indians is involved with non-Indians to a degree which would permit the State of Montana to require precollection of the tax imposed upon the non-Indians."



This was the approach taken by the district court. *See* J.S. App. 55, n. 8.

VIII. A STATE MAY IMPOSE AN EXCISE TAX ON THE PRIVILEGE OF USING A MOTOR VEHICLE WITH RESPECT TO MOTOR VEHICLES, TRAVEL TRAILERS AND CAMPERS OWNED BY AN INDIAN TRIBE OR ITS ENROLLED MEMBERS RESIDING UPON THE RESERVATION, WHERE THE MOTOR VEHICLES ARE USED PARTLY ON AND PARTLY OFF THE RESERVATION.

In objecting to payment of Washington state motor vehicle excise taxes the appellant Indians in *Colville* (and only in *Colville*) are claiming a "free ride" for their vehicles on the public highways throughout the State. They certainly have a right to this free ride so long as those vehicles remain within their respective reservations.[77] The question here is whether they have a like right everywhere else in the state.[78]

### A. THE STATE'S MOTOR VEHICLE EXCISE TAX SCHEME.

To put this question in perspective it may be helpful to review Washington's system of taxes and fees for motor vehicles. That system might best be shown through the example of an ordinary purchase of a new automobile by an ordinary Washington resident.

#### 1. The Retail Sales Tax.

If the purchaser buys his new automobile within the state he must, of course, pay the retail sales tax—which is applicable to retail sales of almost all types of tangible personal property. See chapter 82.08 RCW. If, however, he

[77]We conceded in the district court that the excise taxes here involved cannot, under *McClanahan* and *Moe*, be applied to vehicles which are owned by reservation Indians (or a Tribe) and which never leave the reservation. (J.S. App. 42)

[78]As we shall see shortly, the ride is not entirely free, as the Indians themselves will admit.

purchases the same automobile in Portland, Oregon, the sales tax is not applicable even though he may immediately bring his new automobile into Washington because the "tax event" (*i.e.*, the retail sale) in that case is beyond the reach of Washington's jurisdiction.[79]

2. **The Use Tax.**

The *use* of that automobile, on the other hand, is not beyond Washington's reach. Accordingly, a state use tax will be due and payable when the car is brought into the state with the same rate and the same tax base as the retail sales tax. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), and chapter 82.12 RCW. This is so because for the use tax, the "tax event" is not the sale of the property but, rather, it is (in the terms of the statute itself) "the privilege of using within this state as a consumer any article of tangible personal property purchased at retail. * * *" RCW 82.12.020.[80]

3. **Licensing and Registration Fees.**

In addition, if the automobile is to be driven on a public highway it must have a license. RCW 46.16.010.[81] And there is a fee for that license; $13.40 for the initial license and $9.40 for each annual renewal. RCW 46.16.060.

[79]By "tax event" we mean the legal incidence of the tax; *i.e.*, the activity, occurrence, privilege, or other legal relationship upon which the tax is imposed. We use the term "tax event" because that is the term used by the District Court in *Moe*. See pp. 113-114, *infra*.

[80]One further feature of both the sales tax and the use tax should also be noted. The applicability of either tax in no way depends upon whether the automobile is used on a public highway. If it is used simply to drive around on a farm, or even if it just sits in a garage, one or the other of the two taxes will apply.

[81]RCW 46.16.010 (Br. App. 32a) reads, in pertinent part, as follows:

"It shall be unlawful for a person to operate any vehicle over and along a public highway of this state without first having obtained and having in full force and effect a current and proper vehicle license and display vehicle license number plates therefor as by this chapter provided: * * *"



4. **Motor Vehicle Excise Tax.**

This tax, which is the one at issue in this case, might best be described as an annual use tax. In the language of RCW 82.44.020 (the statute imposing the tax):

> "An excise tax is imposed for the privilege of using in the state any motor vehicle. * * * The annual amount of such excise shall be two percent of the fair market value of such vehicle. * * *" (Br. App. 27a)

Under this provision the reach of the motor vehicle excise tax would appear to be as broad as the general use tax. The tax would thus seemingly apply even if the automobile was never used on the public highways. Actually, however, its reach is somewhat narrower—for RCW 82.44.060 provides that:

> "The excise tax hereby imposed shall be due and payable * * * at the time of registration of a motor vehicle." *(Id.)*

And registration or licensing, as we have seen, is necessary only when the automobile is to be used on a public highway. Thus, if a vehicle is not so used—and therefore does not have to be registered and licensed—no excise tax is "due and payable".

B. **THE COLVILLE CHALLLENGE.**

Notably, *it is only the motor vehicle excise tax which the Indians in* Colville *are challenging.* They contend (unlike the Indians in *Yakima*) that they are immune from the motor vehicle excise tax *even with respect to motor vehicles which are used on public highways outside the reservation.*[82] Yet, as in *Moe*, the Indians make no contention that they are immune from payment of the $9.40 (or $13.40) licensing fee—for good reason. Without paying that fee they cannot obtain the licenses without which (and without the display of which) the operation of their vehicles on those same public highways is unlawful; RCW 46.16.010, *supra*. As above indicated, however, the

[82]They likewise claim, of course, with respect to the travel trailer and camper excise taxes.

incidence of the license fee and excise tax is the same, even though only the license is needed in order to avoid being cited or arrested by the state highway patrol.

The point, simply stated, is this: If the tax event takes place within the reservation and the taxpayer is an Indian, the state cannot reach it. *McClanahan, supra.* But if the tax event takes place off the reservation, the state can reach it. *Mescalero, supra.* And when an Indian-owned vehicle comes off the reservation the tax event under the motor vehicle excise tax likewise takes place off the reservation—and the state can reach it, just as with the use tax and the license fee.

The Indians, however, contend that *Moe* requires a different result. The district court agreed—but only because it confused what is really very simple. This confusion is best shown in the following excerpt from the District Court's opinion:

> "Although there is no doubt that *Mescalero* would control if this issue involved use exclusively off the reservation, we do not agree that *Moe* is not controlling on the facts presented here. A review of the District Court's decision in *Moe* reveals that *the vehicle use there taxed* was partly on and partly off the Flathead Reservation. *Confederated Salish & Kootenai Tribes v. Montana,* 392 F.Supp. 1325, 1328-29 (D. Mont. 1975), aff'd, 425 U.S. 463 (1976), (Smith, J., concurring and dissenting). Moreover, the Montana tax invalidated in *Moe* was, except for labeling, identical in operation and effect to the tax here imposed." (Emphasis supplied) (J.S. App. 42)

This review of the District Court decision in *Moe,* however, was not careful enough. A more careful review would have shown that in *Moe,* Montana was not taxing "vehicle use" at all. The district court opinion in *Moe* tells us, with exact accuracy, what Montana was taxing. In striking down both the Montana cigarette tax on sales to Indians, and the Montana personal property tax on Indian-owned vehicles, that court stated:

"The *'tax event'*, i.e., the sale of cigarettes *or the*



> *ownership of a motor vehicle as of January 1 of each year* (R.C.M. 1947, § 84-406(2) (1974 Supp.)) in both cases *occurs on the reservation. Moe* and *McClanahan* are therefore controlling and require this court to grant summary judgment in favor of the plaintiffs." 392 F.Supp. at 1327. (Emphasis supplied)

The single tax event in that case (*i.e.*, the ownership of the motor vehicle as of January 1 of each year) thus took place on the reservation. As is typical with property taxes, the tax event took place on a certain single day, and in a certain single place. Because that tax event took place only on the reservation, *McClanahan* required that the vehicles be immune from the tax.

Under the Washington motor vehicle excise tax, however, this is not the case. It is an excise tax (even though measured by the value of the vehicle) and not a property tax. As the Washington State Supreme Court said in so ruling in *State ex rel. Hansen v. Salter,* 190 Wash. 703, 70 P.2d 1056 (1937),

> "* * * It is urged that the exaction is a property tax—not an excise—and therefore denies 'equal protection of the laws' guaranteed by the fourteenth amendment of the constitution of the United States, and the demands of equality and uniformity in taxation under the fourteenth amendment to the state constitution. That a tax upon the use of personal property is an excise, is no longer open to question in this state. *Morrow v. Henneford,* 182 Wash. 625, 47 P. (2d) 1016; *Vancouver Oil Co. v. Henneford,* 183 Wash. 317, 49 P. (2d) 14; *Henneford v. Silas Mason Co.,* 300 U.S. 577, 57 S.Ct. 524. Being an excise, the tax is not objectionable upon the grounds suggested. * * *"[83] 190 Wash. at 705, 70 P.2d at 1056-57.

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[83]As stated by this Court in *Gurley v. Rhoden,* 421 U.S. 200 (1975), quoting from *American Oil Co. v. Neill,* 380 U.S. 451, 455 (1965):

> "When a state court has made its own definitive determination as to the operating incidence [of a state tax], our task is simplified. We give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." 421 U.S. at 208.

Thus, only so long as the vehicle stays on the reservation does the tax event exclusively occur on the reservation. But when the vehicle comes off the reservation the tax event correspondingly occurs off the reservation. In contrast to the Montana property tax, under the motor vehicle excise tax the tax event constantly trails along with the vehicle itself. And *Mescalero* thus requires that this off-reservation use of the vehicle not be immune from the tax.

Finally, this same confusion of the District Court below is also shown by its discussion of the necessity to "disregard labels" and its emphasis on the similarity in "practical operation" between the Montana property tax and the Washington motor vehicle excise tax (J.S. App. 43).

To illustrate: The typical sales tax and a use tax are, in "practical operation," often identical. An identical rate is applied to an identical base with respect to identical sorts of property. Only the tax event or incidence of the tax is different. But this difference is the precise reason why a sales tax will be struck down while a use tax will be upheld. Compare *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944), and *General Trading Co. v. State Tax Comm'n*, 322 U.S. 335 (1944). One might label the difference as just a difference of "labels"; but however labelled, the difference is crucial, not only in the sales-use tax area, but in this area also. It is crucial with respect to property crossing an interstate boundary—and with respect to property crossing a reservation boundary as well.

## CONCLUSION

The State submits that the decision of the district court is directly contrary to this Court's decision in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). If allowed to stand, the decision would leave the continued viability of *Moe* to the whim of each Indian Tribe. Furthermore, the decision below elevates Indian Tribes to the position of sovereign nations, with full



governmental power over non-Indians, a concept which has been rejected by this Court throughout its history.

Indian Tribes, as a matter of inherent tribal sovereignty or by delegation from the federal government, have no power to oust the state of its legitimate right to tax its own non-Indian citizens. Even assuming that the Tribe has the right to tax non-Indians with respect to on-reservation transactions with reservation Indians, the exercise of that power does not vitiate a state tax on the non-Indian. The impact of the state's tax upon the self-governing ability of the Tribe is remote and indirect — if it exists at all. To the extent that it results in Indian Tribes being unable to market a tax exemption, the state's tax nevertheless interferes with no legitimate tribal governmental right.

The Tribes and their licensed retailers have involved themselves with non-Indians in the State of Washington to a degree which clearly calls for the exercise of state power in order that wholesale violations of state law by non-Indians do not go unchecked. The Tribes ought not be allowed to hide behind illusory delegations of federal power or discarded notions of tribal sovereignty. Furthermore, the executive branch of the United States government, in its rush to foster tribal economic development, ought not be allowed to serve as an "aider and abettor", unaided by clear congressional direction, of these very same wholesale violations of state law.

On the other hand, this Court should recognize that the State of Washington has a legitimate interest in protecting its treasury. The rules and regulations adopted by the state to enforce cigarette and sales tax collection responsibility are reasonable, and there is no reason why the state should not be permitted to apply them to the Tribes and/or their licensed retailers.

Accordingly, the State requests this Court to reverse the decision of the district court and hold that the state may require the Tribes to collect the state's cigarette and sales taxes imposed upon non-members of the tribe in the manner prescribed by state law.

In the *Colville* case, the Court should dissolve those portions of the injunction entered by the district court preventing the state from imposing and enforcing its sales and cigarette taxes with respect to sales to non-members of the tribe; and imposing and enforcing its motor vehicle, travel trailer and camper excise taxes upon the tribes or their reservation resident members with respect to vehicles used partly on or partly off the reservation.

In the *Yakima* case, the Court should dissolve the injunction of the district court to the extent that it prohibits the state from imposing and enforcing its cigarette and sales taxes upon sales by the tribally-licensed retailers to non-Indians.

This Court should remand the case to the district court for further proceedings consistent with this Court's opinion.

DATED this 4th day of May, 1979.

Respectfully submitted,

SLADE GORTON, *Attorney General*
*State of Washington*

PHILIP H. AUSTIN,
*Deputy Attorney General*

RICHARD H. HOLMQUIST,
*Senior Assistant Attorney General*

TIMOTHY R. MALONE
LARRY R. SCHREITER
MATTHEW J. COYLE,
*Assistant Attorneys General*

*Attorneys for Appellants.*



## APPENDIX A

### U.S. Constitutional Provisions:

U.S. CONST., Art. I, §8, cl. 3:

"The Congress shall have Power * * *
To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes;"

U.S. CONST., Art. VI, cl. 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. CONST., Amendment XIV, §1:

"* * * No State shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws."

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## APPENDIX B

### Treaty with the Dwamish &c. Indians (Lummi), Jan. 22, 1855, 12 Stat. 927, Art. II:

"ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same

called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island called Shäis-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them."

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## APPENDIX C

**Treaty with the Makah Tribe, Jan. 31, 1855, 12 Stat. 939, Art. II:**

"ARTICLE II. There is, however, reserved for the present use and occupation of the said tribe the following tract of land, viz: Commencing on the beach at the mouth of a small brook running into Neah Bay next to the site of the old Spanish fort; thence along the shore round Cape Classett or Flattery, to the mouth of another small stream running into the bay on the south side of said cape, a little above the Waatch village; thence following said brook to its source; thence in a straight line to the source of the first-mentioned brook, and thence following the same down to the place of beginning; which said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent; but if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band to occupy the same in common with those above mentioned, he shall be at liberty to do so."



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## APPENDIX D

**Treaty with the Yakamas, June 9, 1855, 12 Stat. 951, Art. II:**

"ARTICLE II. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit:

Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said

reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States, to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

*And provided*, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid."

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## APPENDIX E

**EXECUTIVE ORDER of July 2, 1872 (Colville reservation):**

EXECUTIVE MANSION, *Washington, July 2, 1872.*

It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein



named by Executive order of April 9, 1872, be restored to the public domain, and that in lieu thereof the country bounded on the east and south by the Columbia River, on the west by the Okanagan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

U. S. GRANT.

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## APPENDIX F

**WASHINGTON ENABLING ACT, 25 Stat. 676, ch. 180, §4 (1889):**

"SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments for said proposed states, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:

* * *

Second. That the people inhabiting said proposed

States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

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## APPENDIX G

### Public Law 83-280, 67 Stat. 588, ch. 505 (1953).

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.



*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

Sec. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§1162. State jurisdiction over offenses committed by or against Indians in the Indian country.

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State, shall have the same force and effect within such Indian country as they have elsewhere within the State:

| "State of | Indian Country Affected |
|---|---|
| California | All Indian country within the State |
| Minnesota | All Indian country within the State, except the Red Lake Reservation |
| Nebraska | All Indian country within the State |
| Oregon | All Indian country within the State, except the Warm Springs Reservation |
| Wisconsin | All Indian country within the State, except the Menominee Reservation |

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize

regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

Sec. 3. Chapter 85 of Title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

Sec. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§1360. State civil jurisdiction in action to which Indians are parties.

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

| "State of | Indian Country Affected |
|---|---|
| California | All Indian country within the State |
| Minnesota | All Indian country within the State, except the Red Lake Reservation |
| Nebraska | All Indian country within the State |



| | |
|---|---|
| Oregon | All Indian country within the State, except the Warm Springs Reservation |
| Wisconsin | All Indian country within the State, except the Menominee Reservation |

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

Sec. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their state constitution or statutes as the case may be.

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

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## APPENDIX H

**Public Law 83-280, 67 Stat. 588, ch. 505, §2 (1953), *as amended,* codified at 18 U.S.C. §1162 (1976):**

**§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country**

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

| *State or Territory of* | *Indian country affected* |
|---|---|
| Alaska | All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which the State jurisdiction has not been extended. |
| California | All Indian country within the State |
| Minnesota | All Indian country within the State, except the Red Lake Reservation |
| Nebraska | All Indian country within the State |
| Oregon | All Indian country within the State, except the Warm Springs Reservation |
| Wisconsin | All Indian country within the State |



(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

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## APPENDIX I

**Public Law 83-280, 67 Stat. 588, ch. 505, §4 (1953), *as amended,* codified at 28 U.S.C. §1360 (1976):**

**"§ 1360. State civil jurisdiction in actions to which Indians are parties**

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

| *State or Territory of* | *Indian country affected* |
|---|---|
| Alaska | All Indian country within the Territory |
| California | All Indian country within the State |
| Minnesota | All Indian country within the State, except the Red Lake Reservation |
| Nebraska | All Indian country within the State |
| Oregon | All Indian country within the State, except the Warm Springs Reservation |
| Wisconsin | All Indian country within the State |

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.



(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

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## APPENDIX J

**Public Law 90-284, Title IV, 82 Stat. 78, codified at 25 U.S.C. §§1321-1326 (1976):**

**§1321**

(a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band,

or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

**§1322**

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.



**§1323**

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

**§1324**

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

**§1325**

(a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this subchapter shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) No cession made by the United States under this subchapter shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense

committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purpose of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

**§1326**

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

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## APPENDIX K

**28 U.S.C. §1253 (1976):**

**§ 1253. Direct appeals from decisions of three-judge courts**

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

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## APPENDIX L

**28 U.S.C. §2101(b) (1976):**

**§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay**

* * *

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

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## APPENDIX M

**FED. R. CIV. P. 59(a) & (b):**

**(a) Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

**(b) Time for Motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

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## APPENDIX N

**WASH. CONST., Art. XXVI, §2:**

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:

* * *

**Second.** That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: *Provided*, That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.



## APPENDIX O

**Retail Sales Tax, ch. 82.08 RCW**

**82.08.020 Retail sales tax imposed.** There is levied and there shall be collected a tax on each retail sale in this state equal to four and one-half percent of the selling price: *Provided*, That from and after the first day of June, 1976, until the thirtieth day of June, 1977, such tax shall be levied and collected in an amount equal to four and six-tenths percent of the selling price. The tax imposed under this chapter shall apply to successive retail sales of the same property.

**82.08.030 Exemptions.** The tax hereby levied shall not apply to the following sales:

* * *

(4) Sales which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States;

**82.08.050 Buyer to pay, seller to collect tax —— Penalties.** The tax hereby imposed shall be paid by the buyer to the seller, and each seller shall collect from the buyer the full amount of the tax payable in respect to each taxable sale in accordance with the schedule of collections adopted by the department pursuant to the provisions of RCW 82.08.060. The tax required by this chapter, to be collected by the seller, shall be deemed to be held in trust by the seller until paid to the department, and any seller who appropriates or converts the tax collected to his own use or to any use other than the payment of the tax to the extent that the money required to be collected is not available for payment on the due date as prescribed in this chapter shall be guilty of a gross misdemeanor.

In case any seller fails to collect the tax herein imposed or having collected the tax, fails to pay it to the department in the manner prescribed by this chapter, whether such failure is the result of his own acts or the

result of acts or conditions beyond his control, he shall, nevertheless, be personally liable to the state for the amount of the tax.

The amount of tax, until paid by the buyer to the seller or to the department, shall constitute a debt from the buyer to the seller and any seller who fails or refuses to collect the tax as required with intent to violate the provisions of this chapter or to gain some advantage or benefit, either direct or indirect, and any buyer who refuses to pay any tax due under this chapter shall be guilty of a misdemeanor. The tax required by this chapter to be collected by the seller shall be stated separately from the selling price and for purposes of determining the tax due from the buyer to the seller and from the seller to the department it shall be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter.

Where a buyer has failed to pay to the seller the tax imposed by this chapter and the seller has not paid the amount of the tax to the department, the department may, in its discretion, proceed directly against the buyer for collection of the tax, in which case a penalty of ten percent may be added to the amount of the tax for failure of the buyer to pay the same to the seller, regardless of when the tax may be collected by the department; and all of the provisions of chapter 82.32 RCW, including those relative to interest and penalties, shall apply in addition; and, for the sole purpose of applying the various provisions of chapter 82.32 RCW, the fifteenth day of the month following the tax period in which the purchase was made shall be considered as the due date of the tax.



## APPENDIX P

### Use Tax, ch. 82.12 RCW

**82.12.020 Use tax imposed.** There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment, or extracted or produced or manufactured by the person so using the same, or otherwise furnished to a person engaged in any business taxable under RCW 82.04.280, subsections (2) or (7). This tax will not apply with respect to the use of any article of tangible personal property purchased, extracted, produced or manufactured outside this state until the transportation of such article has finally ended or until such article has become commingled with the general mass of property in this state. This tax shall apply to the use of every article of tangible personal property, including property acquired at a casual or isolated sale, and including byproducts used by the manufacturer thereof, except as hereinafter provided, irrespective of whether the article or similar articles are manufactured or are available for purchase within this state. Except as provided in subdivision (2) of RCW 82.12.030, payment by one purchaser or user of tangible personal property of the tax imposed by chapter 82.08 or 82.12 RCW shall not have the effect of exempting any other purchaser or user of the same property from the taxes imposed by such chapters. The tax shall be levied and collected in an amount equal to the value of the article used by the taxpayer multiplied by the rate of four and one-half percent: *Provided,* That from and after the first day of June, 1976, until the thirtieth day of June, 1977, such tax shall be levied and collected in an amount equal to the value of the article used by the taxpayer multiplied by the rate of four and six-tenths percent.

## APPENDIX Q

### Cigarette Tax, ch. 82.24 RCW

**82.24.020 Tax imposed —— Rate —— Possession, defined.** There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes, in an amount equal to the rate of six and one-half mills per cigarette. For purposes of this section, and for purposes of RCW 28A.47.440 and 73.32.130, "possession" shall mean both (1) physical possession by the purchaser and, (2) when cigarettes are being transported to or held for the purchaser or his designee by a person other than the purchaser, constructive possession by the purchaser or his designee, which constructive possession shall be deemed to occur at the location of the cigarettes being so transported or held.

**82.24.030 Stamps to be affixed —— Meter machines authorized.** In order to enforce collection of the tax hereby levied, the department of revenue shall design and have printed stamps of such size and denominations as may be determined by the department, such stamps to be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the department to readily ascertain by inspection, whether or not such tax has been paid. Every person shall cause to be affixed on every package of cigarettes on which a tax is due, stamps of an amount equaling the tax due thereon before he sells, offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same: *Provided,* That where it is established to the satisfaction of the department that it is impractical to affix such stamps to the smallest container or package, the department may authorize the affixing of stamps of appropriate denomination to a large container or package.



The department may authorize the use of meter stamping machines for imprinting stamps, which imprinted stamps shall be in lieu of those otherwise provided for under this chapter, and if such use is authorized, shall provide reasonable rules and regulations with respect thereto.

**82.24.040 Duty of wholesaler.** Every wholesaler in this state shall, within a reasonable time after receipt of any of the articles taxed herein, cause the same to have the requisite denomination and amount of stamps affixed to represent the tax imposed herein: *Provided,* That any wholesaler who furnishes surety bond in a sum satisfactory to the department, shall be permitted to set aside, without affixing the stamps required by this chapter, such part of his stock as may be necessary for the conduct of his business in making sales to persons in another state or foreign country, to instrumentalities of the federal government, or to the established governing bodies of any Indian tribe, recognized as such by the United States Department of the Interior. Such unstamped stock shall be kept separate and apart from stamped stock: *Provided further,* That every wholesaler shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state, or to a federal instrumentality, or to an Indian tribal organization, make a true duplicate invoice of the same which shall show full and complete details of the sale or delivery, whether or not stamps were affixed thereto, and shall transmit such true duplicate invoice to the main office of the department, at Olympia, not later than the fifteenth day of the following calendar month, and for failure to comply with the requirements of this section the department may revoke the permission granted to the taxpayer to maintain a stock of goods to which the stamps required by this chapter have not been affixed. The department may also revoke this permission to maintain a stock of unstamped goods for sale to a specific Indian tribal organization when it appears that sales of unstamped cigarettes to persons who are not

enrolled members of a recognized Indian tribe are taking place, or have taken place, within the exterior boundaries of the reservation occupied by that tribe.

**82.24.050 Duty of retailer.** Every retailer shall, within a reasonable time after receipt of any of the articles taxed herein, cause the same to have the requisite denomination and amount of stamps affixed to represent the tax imposed herein: *Provided,* That those articles to which stamps have been properly affixed by a wholesaler or another retailer may be retained by any retailer, and that those articles intended for sale to qualified purchasers may be retained by federal instrumentalities and Indian tribal organizations, without affixing the stamps required by this chapter.

**82.24.080 Legislative intent.** It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, handled, possessed, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively, in accordance with RCW 82.24.020) or distributes them in the state. It is further the intent and purpose of this chapter that whenever any of the articles herein taxed is given away for advertising or any other purpose, it shall be taxed in the same manner as if it were sold, used, consumed, handled, possessed, or distributed in this state.

It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event occurring within this state: *Provided, however,* That failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

**82.24.130 Contraband —— Seizure and sale.** Subject to the provisions of RCW 82.24.250, any articles taxed herein found at any point within this state, which articles shall be held, owned or possessed by any person, and not having the stamps affixed to the packages or



containers are hereby declared to be contraband goods, and may be seized by the department of revenue, or its duly authorized agent, or by any peace officer of the state, when directed by the department of revenue so to do, without a warrant, and said goods shall be offered by the department of revenue for sale at public auction to the highest bidder after due advertisement, but the department of revenue before delivering any of the goods so seized shall require the person, to whom such articles are sold, to affix the proper amount of stamps. The proceeds of sale of any goods sold hereunder shall be paid to the department of revenue.

The cost of seizure and sale shall be paid out of the proceeds derived from the sale before making remittance.

Any vending machine and any vehicle, not a common carrier, which may be used for the purpose of violating the provisions of his chapter shall likewise be subject to seizure and sale in the same manner.

Notwithstanding the foregoing provisions of this section, articles taxed herein which are in the possession of a wholesaler or retailer, licensed by the department, pursuant to the provisions of chapter 19.91 RCW for a period of time necessary to affix the stamps after receipt of the articles, shall not be considered contraband.

**82.24.250 Transportation of unstamped cigarettes —— Invoices and delivery tickets required —— Stop and inspect.** Every person who shall transport cigarettes not having the stamps affixed to the packages or containers, upon the public highways, roads or streets of this state shall have in his actual possession invoices or delivery tickets for such cigarettes, which shall show the true name and address of the consignor or seller, the true name of the consignee or purchaser, and the quantity and the brands of cigarettes so transported. If the cigarettes are consigned to or purchased by any person in this state such purchaser or consignee must be a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state. In the absence of such

invoices or delivery tickets, or, if the name or address of the consignee or purchaser is falsified or if the purchaser or consignee is not authorized by chapter 82.24 RCW to possess unstamped cigarettes, the cigarettes so transported shall be deemed contraband subject to seizure and sale under the provisions of RCW 82.24.130.

Transportation of cigarettes from a point outside this state to a point in some other state will not be considered a violation of this section provided that the person so transporting such cigarettes has in his possession adequate invoices or delivery tickets which give the true name and address of such out-of-state purchaser or consignee.

In any case where the department or its duly authorized agent, or any peace officer of the state, has knowledge or reasonable grounds to believe that any vehicle is transporting cigarettes in violation of this section, the department, such agent, or such police officer, is authorized to stop such vehicle and to inspect the same for contraband cigarettes.

For purposes of this section, the term "person authorized by chapter 82.24 RCW to possess unstamped cigarettes" shall mean a wholesaler or retailer licensed pursuant to the provisions of chapter 19.91 RCW, the United States or an agency thereof, and any Indian tribal organization authorized to possess unstamped cigarettes.

**82.24.260 Selling or disposing of unstamped cigarettes —— Retailer to collect and remit tax —— Liability.** Any retailer who sells or otherwise disposes of any unstamped cigarettes other than (1) a federal instrumentality with respect to sales to authorized military personnel and (2) a federally recognized Indian tribal organization with respect to sales to enrolled members of the tribe shall collect from the buyer or transferee thereof the tax imposed on such buyer or transferee by RCW 82.24.020, 28A.47.440, and 73.32.130, and remit the same to the department after deducting from the tax collected the compensation he would have



been entitled to under the provisions of this chapter, RCW 28A.47.440 and 73.32.130 if he had affixed stamps to the unstamped cigarettes. Such remittance shall be made at the same time and manner as remittances of the retail sales tax as required under chapters 82.08 and 82.32 RCW. In the event the retailer fails to collect the tax from the buyer or transferee, or fails to remit the same, the retailer shall be personally liable therefor, and shall be subject to the administrative provisions of RCW 82.24.230 with respect to the collection thereof by the department. The provisions of this section shall not relieve the buyer or possessor of unstamped cigarettes from personal liability for the tax imposed by RCW 82.24.020, 28A.47.440 and 73.32.130.

Nothing in this section shall relieve a wholesaler or a retailer from the requirements of affixing stamps pursuant to RCW 82.24.040 and 82.24.050.

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## APPENDIX R

### Motor Vehicle Excise Tax, ch. 82.44 RCW

**82.44.020 Basic tax imposed.** An excise tax is imposed for the privilege of using in the state any motor vehicle, except those operated under dealer's licenses. The annual amount of such excise shall be two percent of the fair market value of such vehicle: *Provided,* That in no case shall the tax be less than two dollars.

**82.44.060 Payment of tax —— Abatement for fractional year —— Transfer of ownership. (Effective until January 1, 1977.)** The excise tax hereby imposed shall be due and payable to the county auditor at the time of registration of a motor vehicle. Whenever an application is made to the auditor for a license for a motor vehicle he shall collect, in addition to

the amount of the license fee, the amount of the excise tax imposed by this chapter, and no dealer's license or license plates, and no license or license plates for a motor vehicle shall be issued unless such tax is paid in full. The excise tax hereby imposed shall be collected for each calendar year: *Provided,* That the calendar year shall be divided into twelve parts corresponding to the months of the calendar year and the excise tax upon a motor vehicle licensed for the first time in this state after the last day of any month shall only be levied for the remaining months of the calendar year including the month in which the motor vehicle is being licensed: *Provided further,* That the tax shall in no case be less than two dollars.

A motor vehicle shall be deemed licensed for the first time in this state when such vehicle was not previously licensed by this state for the year immediately preceding the year in which the application for license is made.

No additional tax shall be imposed under this chapter upon any vehicle upon the transfer of ownership thereof if the tax imposed with respect to such vehicle has already been paid for the year or fraction of a year in which transfer of ownership occurs.

**82.44.060 Payment of tax —— Abatement for fractional year —— Transfer of ownership. (Effective January 1, 1977.)** The excise tax hereby imposed shall be due and payable to the department of motor vehicles or its agents at the time of registration of a motor vehicle. Whenever an application is made to the department of motor vehicles or its agents for a license for a motor vehicle there shall be collected, in addition to the amount of the license fee or renewal license fee, the amount of the excise tax imposed by this chapter prorated to comply with the effective date of the annual schedule prepared pursuant to RCW 82.44.040, and no dealer's license or license plates, and no license or license plates for a motor vehicle shall be issued unless such tax is paid in full. The excise tax hereby imposed shall be collected for each registration year: *Provided,* That the excise tax upon



a motor vehicle licensed for the first time in this state after the last day of any registration month shall only be levied for the remaining months of the registration year including the month in which the motor vehicle is being licensed: *Provided further,* That the tax shall in no case be less than two dollars.

A motor vehicle shall be deemed licensed for the first time in this state when such vehicle was not previously licensed by this state for the registration year immediately preceding the registration year in which the application for license is made or when the vehicle has been registered in another jurisdiction subsequent to any prior registration in this state.

No additional tax shall be imposed under this chapter upon any vehicle upon the transfer of ownership thereof if the tax imposed with respect to such vehicle has already been paid for the registration year or fraction of a registration year in which transfer of ownership occurs.

**82.44.110 Disposition of revenue.** The county auditor shall regularly, when remitting license fee receipts, pay over and account to the director of motor vehicles for the excise taxes collected under the provisions of this chapter. The director shall forthwith transmit the excise taxes to the state treasurer, ninety-eight percent of which excise tax revenue shall upon receipt thereof be credited by the state treasurer to the general fund, and two percent of which excise tax revenue shall be credited by the state treasurer to the motor vehicle fund to defray administrative and other expenses incurred by the state department of motor vehicles in the collection of the excise tax.

## APPENDIX S

### Taxation of Travel Trailers and Campers, ch. 82.50 RCW

**82.50.400 Tax imposed —— Collection —— Transfer or ownership. (Effective until January 1, 1977.)** An annual excise tax is imposed on the owner of any travel trailer or camper for the privilege of using such travel trailer or camper in this state. The tax shall be collected for each calendar year by the department of motor vehicles or the county auditor of the county in which the travel trailer or camper is located at the time payment is made and shall be due on and after January 1st or on the date the travel trailer or camper is first purchased or brought into this state, and paid on or before January 31st of each calendar year or thirty days after the travel trailer or camper is first purchased or brought into this state, whichever is later. No additional tax shall be imposed under this chapter upon any travel trailer or camper upon the transfer of ownership thereof, if the tax imposed by this chapter with respect to such travel trailer or camper has already been paid for the calendar year or fractional part thereof in which such transfer occurs.

**82.50.400 Tax imposed —— Collection —— Transfer of ownership. (Effective January 1, 1977.)** An annual excise tax is imposed on the owner of any travel trailer or camper for the privilege of using such travel trailer or camper in this state. The tax shall be collected for each registration year by the department of motor vehicles or the county auditor of the county in which the travel trailer or camper is located at the time payment is made and shall be due on and after the first day of the registration year or on the date the travel trailer or camper is first purchased or brought into this state, and paid on or before the first day of each registration year or thirty days after the travel trailer or camper is first purchased or brought into this state, whichever is later. No additional tax shall be imposed under this chapter upon



any travel trailer or camper upon the transfer of ownership thereof, if the tax imposed by this chapter with respect to such travel trailer or camper has already been paid for the registration year or fractional part thereof in which such transfer occurs.

**82.50.410 Rate —— Minimum payable. (Effective until January 1, 1977.)** The rate and measure of tax imposed by this chapter for each calendar year shall be one percent of the fair market value of the travel trailer or camper, as determined in the manner provided in this chapter: *Provided,* That the calendar year shall be divided into twelve parts corresponding to the months of the calendar year and the excise tax upon a travel trailer or camper used for the first time in this state after the last day of any month shall only be levied for the remaining months of the calendar year including the month in which the travel trailer or camper is first used: *Provided further,* That the minimum amount of tax payable shall be two dollars.

A travel trailer or camper shall be deemed used for the first time in this state when such vehicle was not previously licensed by this state for the year or any part thereof immediately preceding the year in which application for license is made.

**82.50.410 Rate —— Minimum payable. (Effective January 1, 1977.)** The rate and measure of tax imposed by this chapter for each registration year shall be one percent of the fair market value of the travel trailer or camper, as determined in the manner provided in this chapter: *Provided,* That the excise tax upon a travel trailer or camper used for the first time in this state after the last day of any registration month shall only be levied for the remaining months of the registration year including the month in which the travel trailer or camper is first used: *Provided further,* That the minimum amount of tax payable shall be two dollars.

A travel trailer or camper shall be deemed used for the first time in this state when such vehicle was not previously licensed by this state for the registration year or any part thereof immediately preceding the registration year in which application of license is made.

**82.50.510 Remittance of tax to state —— Distribution to cities, counties and schools.** The county auditor shall regularly, when remitting motor vehicle excise taxes, pay to the state treasurer the excise taxes collected under this chapter. The treasurer shall then distribute such funds quarterly on the first day of the month of January, April, July and October of each year in the following amount: Fifteen percent to cities and towns for the use thereof apportioned ratably among such cities and towns on the basis of population; fifteen percent to counties for the use thereof to be apportioned ratably among such counties on the basis of moneys collected in such counties from the excise taxes imposed under this chapter; and seventy percent for schools to be deposited in the state general fund.

**82.50.540 Taxed and licensed travel trailers or campers entitled to use streets and highways.** Travel trailers or campers taxed and licensed under the provisions of this chapter shall be entitled to the use of the public streets and highways subject to the provisions of the motor vehicle laws of this state except as herein otherwise provided.

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## APPENDIX T

### Vehicle Licensing, ch. 46.16 RCW

**46.16.010 Licenses and plates required —— Exceptions.** It shall be unlawful for a person to operate any vehicle over and along a public highway of this state



without first having obtained and having in full force and effect a current and proper vehicle license and display vehicle license number plates therefor as by this chapter provided: *Provided,* That these provisions shall not apply to farm vehicle as defined in RCW 46.04.181 if operated within a radius of fifteen miles of the farm where principally used or garaged, farm tractors and farm implements including trailers designed as cook or bunk houses used exclusively for animal herding temporarily operating or drawn upon the public highways, and trailers used exclusively to transport farm implements from one farm to another during the daylight hours or at night when such equipment has lights that comply with the law: *Provided further,* That these provisions shall not apply to spray or fertilizer applicator rigs designed and used exclusively for spraying or fertilization in the conduct of agricultural operations and not primarily for the purpose of transportation, and nurse rigs or equipment auxiliary to the use of and designed or modified for the fueling, repairing or loading of spray and fertilizer applicator rigs and not used, designed or modified primarily for the purpose of transportation: *Provided further,* That these provisions shall not apply to equipment defined as follows:

"Special highway construction equipment" is any vehicle which is designed and used primarily for grading of highways, paving of highways, earth moving, and other construction work on highways and which is not designed or used primarily for the transportation of persons or property on a public highway and which is only incidentally operated or moved over the highway. It includes, but is not limited to, road construction and maintenance machinery so designed and used such as portable air compressors, air drills, asphalt spreaders, bituminous mixers, bucket loaders, track laying tractors, ditchers, leveling graders, finishing machines, motor graders, paving mixers, road rollers, scarifiers, earth moving scrapers and carryalls, lighting plants, welders, pumps, power shovels and draglines, self-propelled and

tractor-drawn earth moving equipment and machinery, including dump trucks and tractor-dump trailer combinations which either (1) are in excess of the legal width or (2) which, because of their length, height or unladen weight, may not be moved on a public highway without the permit specified in RCW 46.44.090 and which are not operated laden except within the boundaries of the project limits as defined by the contract, and other similar types of construction equipment, or (3) which are driven or moved upon a public highway only for the purpose of crossing such highway from one property to another, provided such movement does not exceed five hundred feet and the vehicle is equipped with wheels or pads which will not damage the roadway surface.

Exclusions:

"Special highway construction equipment" does not include any of the following:

Dump trucks originally designed to comply with the legal size and weight provisions of this code notwithstanding any subsequent modification which would require a permit, as specified in RCW 46.44.090, to operate such vehicles on a public highway, including trailers, truck-mounted transit mixers, cranes and shovels, or other vehicles designed for the transportation of persons or property to which machinery has been attached.

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## APPENDIX U

### Administrative Regulation, Cigarette Tax

**WAC 458-20-186 (Rule 186) Tax on cigarettes.** The Washington state cigarette tax is imposed in the total amount of 16 cents upon each package of 20 cigarettes by the following statutes:



1. RCW 82.24.020, which imposes a tax of six and one-half mills per cigarette;

2. RCW 73.32.130, which imposes a tax of 1 mill per cigarette to provide for the retirement of the Veterans Bonus Bonds;

3. RCW 28.47.440 [28A.47.440], which imposes a tax of ½ mill per cigarette to provide for financing the state school construction bond program.

This tax is payable by the first person who sells, uses, consumes, handles or distributes the cigarettes in this state. Payment is made through the purchase of stamps from the Department of Revenue or its authorized agent.

EXEMPTIONS. The cigarette tax does not apply upon cigarettes sold to persons licensed as cigarette distributors in other states when, as a condition of the sale, the seller either delivers the cigarettes to such a buyer at a point outside this state, or delivers the same to a common carrier with the shipment consigned by the seller to such a buyer at a location outside this state. Any person engaged in making sales to licensed distributors in other states or making export sales (see Rule 193A [WAC 458-20-193A] and Rule 193C [WAC 458-20-193C]) or in making sales to the federal government or to the established governing bodies of an Indian tribe recognized as such by the U.S. Department of the Interior and who are authorized by Rule 192 [WAC 458-20-192] to receive unstamped cigarettes who furnishes surety bond in a sum satisfactory to the Department of Revenue, may set aside such part of his stock as may be necessary for the conduct of such business without affixing cigarette tax stamps. Such unstamped stock must be kept separate and apart from any stamped stock.

Cigarettes, other than those above mentioned, are not exempt from the tax by reason of their sale either to an Indian or for resale on an Indian reservation. Permission to maintain an unstamped stock of cigarettes for sale to a specified Indian tribe may be revoked when it appears that sales to unauthorized purchasers are being, or have been, made.

COLLECTION. Stamps indicating the payment of the cigarette tax must be affixed prior to any sale of the cigarettes. The stamp must be applied to the smallest container or package, unless the department determines that it is impractical to do so.

Every wholesaler or retailer in the state shall stamp within 72 hours after receipt, any of the articles taxed herein. Stamps must be of the heat applied "fuson" type. The use of meter stamping machines for use in imprinting packages in lieu of attaching stamps, is not authorized by the department. The use of water "decalcomania" type stamps by such vendors is not authorized.

Persons other than wholesalers or retailers, upon holding, owning, possessing or controlling cigarettes in this state, must affix stamps on or before the close of the first business day following receipt of the cigarettes.

Prior to receipt or transportation of cigarettes in this state such persons must file with a district office of the Department of Revenue a Notice of Intent to Possess Unstamped Cigarettes in the State of Washington. A copy of this notice, validated by an agent of the Department of Revenue, must be in the possession of any such person who is in possession of unstamped cigarettes in this state.

Persons who have filed the aforementioned notice must bring the cigarettes to a district office of the Department of Revenue and there affix the required stamps within the time limitation provided above.

Any unstamped cigarettes in the possession of persons (other than wholesalers or retailers) who have either failed to file a Notice of Intent to Possess Unstamped Cigarettes in the State of Washington or who have failed to affix stamps within the time limitation provided above will be deemed contraband and subject to seizure and sale under the provisions of RCW 82.24.130.

The "fuson" type stamps are available, in rolls of 30,000 stamps, from an authorized bank. Payment for stamps may be made either at the time of the sale, or



deferred until later, although the latter form of payment is available only to vendors who meet the requirements of the department and who have furnished a surety bond equal to the proposed total monthly credit limit, or in the amount of $2,500, whichever is greater. In addition, purchases on a deferred payment plan may be made only by the cigarette seller himself or by an agent authorized by him to do so. This authorization may be in the form of a signature card, filed with the bank, from which stamps are usually obtained, and kept current by the vendor. Payments under a deferred plan are due 30 days following the purchase, and are to be paid at the outlet from which the stamps were obtained, and may be paid by check payable to the Department of Revenue. Cigarette dealers, either retail or wholesale, who purchase stamps under either plan are allowed, as compensation for their services in affixing stamps, an amount equal to $1.85 per thousand stamps, which may be offset against the purchase price.

BOOKS AND RECORDS. An accurate set of records, showing all transactions had with reference to the purchase, sale or distribution of articles subject to the cigarette tax must be retained. These records may be combined with those required in connection with the Tobacco Products Tax, by Rule 185 [WAC 458-20-185], provided there is a segregation therein of the amount involved. All such records must be preserved for 5 years from the date of the transaction.

In particular, persons shipping or delivering any of the articles taxed herein to a point outside of this state shall transmit to the Miscellaneous Tax Section, not later than the 15th of the following calendar month, a true duplicate invoice showing full and complete details of the interstate sale or delivery.

REPORTS AND RETURNS. The Department of Revenue may require any person dealing with cigarettes, in this state, to complete and return forms, as furnished, setting forth sales, inventory and other data required by the department to maintain control over trade in the articles taxed herein.

Manufacturers selling these articles shall, before the 15th day of each month, transmit to the Miscellaneous Tax Section a complete record of sales of cigarettes in this state during the preceding month.

REFUNDS. Any person may request a refund of the face value of the stamps, less the affixing discount when cigarettes to which they are affixed are:

1. Damaged, or unfit for sale, and as a result are destroyed or returned to the manufacturer or distributor.

2. Sold and shipped to a registered dealer regularly making sales of cigarettes in another state.

In either case, the claim for refund, (a form which is provided by the department) must be accompanied by an affidavit, in the first instance, of the receipt by the manufacturer and, in the second instance, of the receipt by the buyer of cigarettes bearing stamps from this state.

Revised May 2, 1975.

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## APPENDIX V

### Administrative Regulation

### WAC 458-20-192 (Rule 192) Indians, Indian Reservations

DEFINITIONS

The term "Indian reservation," as used herein, means all lands, notwithstanding the issuance of any patent, within the exterior boundaries of areas set aside by the United States for the exclusive use and occupancy of Indian tribes by treaty, law, or executive order which areas are currently recognized as "Indian reservations" by the United States Department of the Interior.



The following Washington reservations are the only "Indian reservations" currently recognized as such by the United States Department of Interior: Chehalis, Colville, Hoh, Kalispel, Lower Elwha, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Ozette, Port Gamble, Port Madison, Puyallup, Quileute, Quinault, Shoalwater, Skokomish, Spokane, Squaxin Island, Swinomish, Tulalip, and Yakima.

The term "Indian tribe," as used herein, means any organized Indian nation, tribe, band, or community recognized as an "Indian tribe" by the United States Department of the Interior.

The term "Indian," as used herein, means persons duly registered on the tribal rolls of the Indian tribe occupying an Indian reservation.

NOTE: For purposes of this rule, with respect to determining tax liability regarding any economic transaction or activity, the term "Indian tribe" includes only an Indian tribe upon and within whose Indian reservation such transaction or activity occurs, and the term "Indian" includes only a person duly registered on the tribal rolls of the Indian tribe upon and within whose Indian reservation such transaction or activity occurs.

Under the revenue laws of the State of Washington, the tax liability of Indians and of persons conducting business with Indians is as follows:

BUSINESS AND OCCUPATION TAX

Indians and Indian tribes are not taxable with respect to business conducted by them wholly within an Indian reservation.

No deduction is allowed to others by reason of business conducted with Indians or Indian tribes within an Indian reservation.

RETAIL SALES TAX

Indians and Indian tribes are not subject to the sales tax upon sales to them of tangible personal property or

otherwise taxable services which are made wholly within an Indian reservation.

Sales of tangible personal property to Indians or Indian tribes by off-reservation persons are subject to the retail sales tax except where the seller makes actual delivery of the property sold to a point within an Indian reservation.

Sales of taxable services to Indians or Indian tribes are subject to the retail sales tax except where the services are rendered entirely within an Indian reservation.

Sales to persons other than Indians are subject to the retail sales tax irrespective of where delivery or rendition of services takes place. Thus, Indian and Indian tribal retailers are required to collect and remit to the state the retail sales tax upon each taxable sale made by them within an Indian reservation to persons other than Indians.

In order to substantiate the tax-exempt status of a retail sale made within an Indian reservation to an Indian purchaser, unless the purchaser is personally known to the retailer as an enrolled Indian, the retailer shall require presentation of a tribal membership card identifying the purchaser as duly registered on the tribal rolls of an Indian tribe under such lawful criteria as the tribal organization has established. A record shall be retained by the retailer of all tax-exempt sales to support the sales tax deduction on returns filed with the Department, identifying the dollar amount of the sale and indicating the name of the purchaser, tribal affiliation of the purchaser, the Indian reservation to which or within which delivery or rendition of services was made, and the date of sale.

## USE TAX

Indians and Indian tribes are not subject to the use tax upon the use of tangible personal property within an Indian reservation. However, Indians and Indian tribes will become liable for the use tax when any such property



is placed into actual use outside the Indian reservation, irrespective of the fact that the first use of the property may have been within the reservation.

SPECIAL APPLICATION OF RETAIL SALES TAX AND USE TAX WITH RESPECT TO SALES OF MOTOR VEHICLES OR TRAILERS TO INDIANS AND INDIAN TRIBES. When motor vehicles or trailers sold to Indians or Indian tribes are licensed by the State of Washington at the time of sale, or at any time thereafter, a presumption is raised that such motor vehicles or trailers are for use on the highways of the State of Washington. When motor vehicles or trailers are licensed prior to delivery, dealers are required to collect the retail sales tax in every instance, regardless of delivery point. County Auditors must collect the use tax when Indians or Indian tribes apply for a license or transfer of registration unless the applicant can show that retail sales tax or use tax has previously been paid on the sale or use of the vehicle or trailer by the applicant.

## CIGARETTE TAX

Sales of cigarettes to non-Indians by Indians or Indian tribes are subject to the cigarette tax, since the tax is levied upon the non-Indian purchaser and the vendor is obligated to make precollection of the tax. Therefore, Indian or tribal vendors making, or intending to make, sales to non-Indian customers must purchase a stock of cigarettes with Washington state cigarette tax stamps affixed for the purpose of making such sales. However, Indians and Indian tribes may make purchases of unstamped cigarettes from licensed cigarette distributors for resale to qualified purchasers. For purposes of this rule, "qualified purchaser" means (1) an Indian purchasing for resale within the reservation to other Indians, and (2) an Indian purchasing solely for his or her use other than for resale.

Delivery of unstamped cigarettes by a licensed distributor to Indians or Indian tribes must be by bonded

carrier or the distributor's own vehicle to the Indian reservation. Delivery of unstamped cigarettes at the distributor's dock or place of business or any other off-reservation location is prohibited.

Revised November 12, 1976.

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## APPENDIX W

## EXCISE TAX BULLETIN

ETB 504.08.192 Issued November 24, 1976

### SALES TO OR BY INDIANS

The purpose of the bulletin is to outline procedures to implement Rule 192, as revised November 12, 1976, and to provide additional details for explanation of certain provisions of that administrative rule.

1. **Registration Requirements.** All retailers within an Indian reservation are required to collect sales tax (and cigarette tax) on sales to non-Indians. This means that Indian retailers and Indian tribe retailers are required to be registered to collect and remit to the State the applicable State and local sales tax and the cigarette tax on sales to non-Indians, but no registration fee is required for registration of such retailers. (Such a business license fee is constitutionally impermissible under Moe v. Salish and Kootenai Tribes, 48 L Ed 2d 96.)

Retailers can accomplish registration by telephoning or going to any of the following offices of the State Department of Revenue:

**Aberdeen** 532-2840
2700 Simpson Avenue
P.O. Box 1018, 98520

**Port Angeles** 457-8503
1601 East Front Street
Bldg. 2, Suite A, 98362



**Bellingham** 676-2114
2500 Elm Street, Suite A
P.O. Box 1176, 98225

**Bremerton** 478-4961
Great N.W. Savings & Loan Bldg.
Lower Level, 5th & Pacific
P.O. Box 407, 98310

**Ephrata** 754-3771
138 W. Division
P.O. Box 11184, 98823

**Everett** 259-8566
2020 35th Street
P.O. Box 6, 98206

**Longview** 577-2015
P.O. Box 339
1418 15th St., Weyerhaeuser Credit Union Bldg., Rm. 304, 98632

**Mt. Vernon** 336-2954
416 Main Street (Monday only)
P.O. Box 278, 98273

**Pasco** 545-2442
1600 C West Clark
P.O. Box 767, 99301

**Seattle** 464-6827
710 Second Avenue
901 Dexter Horton Bldg., 98104

**Spokane** 456-3140
300 Northtown Office Bldg.
North 4407 Division, 99207

**Tacoma** 593-2874
Rm. 207 Professional Bldg.
705 S. 9th, 98405

**Vancouver** 696-6151
State Office Bldg.
904 Franklin Street
P.O. Box 787, 98660

**Walla Walla** 527-4306
202 Drumheller Bldg., 99362

**Wenatchee** 663-1651
1139 Princeton
P.O. Box 1945, 98801

**Yakima** 575-2783
214 Liberty Bldg.
P.O. Box 407, 98907

**Olympia Headquarters** 753-5540
412 General Administration Bldg.
Olympia, Washington 98504

2. **Records to be Kept.** Sales to Indians, when delivery is made within the Indian reservation on whose tribal rolls such Indian purchasers are duly registered, are exempt from sales tax. But to demonstrate entitlement to make such sales without collection of tax, all retailers must retain, as a part of their books and records to be available for examination by the Department of Revenue as specified by RCW 82.32.070, the following for each sale:

a. Name of the Indian purchaser,
b. The tribal affiliation of the purchaser,
c. The Indian reservation to which or within which delivery was made, or within which retail services were rendered,
d. The dollar amount of the sale, and
e. The date of the sale.

Unless the Indian and his tribal affiliation are personally known to the retailer, the retailer must require the purchaser to present a tribal membership card issued by the tribe in which the purchaser is registered.

3. **Measure of Sales Tax on Cigarette or Tobacco Products Sales.** Under the holding of our Court in Canteen Service, Inc. v. State (83 Wn 2d 761) and Tonasket v. State (84 Wn 2d 164) the cigarette tax and tobacco products tax apply upon the "first taxable event" in this state. This makes a different measure for the sales tax in the case of sales by Indians to non-Indians than is the case for a taxable sale by a non-Indian.

a. **Sale by an Indian to a non-Indian:** Here the first taxable event is the possession by the non-Indian and therefore the cigarette or tobacco products tax due on the sale is *not* a part of the selling price on which sales tax is due.

b. **Sale by a non-Indian:** Here the taxable incidence falls on the first handler, distributor, or seller and thus the first taxable event occurs when the products are first handled, distributed, or sold within this state. Since this occurs prior to the retail sale, the cigarette or tobacco products tax is a part of the selling price, even in the case of sales which are sales tax exempt under paragraph 2, above. Canteen Service, supra.

FOR ARGUMENT

Supreme Court, U.S.
FILED
JUL 14 1979
MICHAEL RODAK, JR., CLERK

No. 78-630

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OCTOBER TERM, 1978

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*v.*

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STATE OF WASHINGTON, APPELLANT

*v.*

UNITED STATES OF AMERICA, AND CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION

*ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON*

## BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
*Solicitor General*

JAMES W. MOORMAN
*Assistant Attorney General*

LOUIS F. CLAIBORNE
*Deputy Solicitor General*

EDWARD J. SHAWAKER
JAMES CLEAR
ANNE S. ALMY
*Attorneys*

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---

*ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON*

---

## BRIEF FOR THE UNITED STATES

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This appeal is from two separate judgments rendered by a three-judge district court in the Eastern District of Washington. One case, *United States of America, et al.* v. *State of Washington, et al.*, Civ. No. 3909 *(Yakima* case) was brought by the United States on behalf of the Confederated Bands and Tribes of the Yakima Nation

and its members (A. 143). The Yakima Tribe intervened as a party plaintiff (J.S. App. 47). The other case, *Confederated Bands of the Colville Indian Reservation et al.* v. *State of Washington, et al.*, Civ. No. 3868 (*Colville* case), was brought by the Confederated Bands & Tribes of the Colville Indian Reservation and the Lummi and Makah Tribes against the State of Washington and various of its officials (A. 1-2). The United States is not a party to the *Colville* case, and the present brief speaks only to the *Yakima* case.

## OPINIONS BELOW

The opinion of the three-judge district court in the consolidated cases (J.S. App. 1-65) is reported at 446 F. Supp. 1339.

## JURISDICTION

The judgment of the three-judge district court in the *Yakima* case (J.S. App. 71-74) was entered on May 10, 1978. The State's motion for a partial new trial was denied on July 17, 1978 (J.S. App. 79). On August 14, 1978, the State filed a notice of appeal to this Court (A. 253).

The State filed a single jurisdictional statement covering both appeals on October 13, 1978. The United States moved to dismiss the appeal in the *Yakima* case for lack of jurisdiction under 28 U.S.C. 1253, on the ground that the three-judge court was improperly convened. On February 21, 1979, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (A. 255). On the question of jurisdiction, we respectfully refer the Court to our previously filed motion to dismiss.



## QUESTION PRESENTED[1]

Whether a State may impose excise and sales taxes on transactions in cigarettes occurring within an Indian Reservation between licensed tribal retailers and nonmembers when the Tribe itself is importantly involved in the enterprise and regulates and taxes such transactions for the purpose of generating governmental revenues and the effect of the State's intervention is substantially to undermine the tribal program.

## STATEMENT

1. The Yakima Nation is a federally recognized Indian tribe with a governing body, the Yakima Tribal Council, which is recognized by the Secretary of the Interior (A. 171). The Tribe occupies the Yakima Indian Reservation, established by the Treaty with the Yakimas, 12 Stat. 951, and encompassing 1,387,505 acres in south-central Washington State. All but 270,895 acres are owned by the United States in trust for the Tribe, its members or other individual Indians (*id.* at 172). The total population on the Yakima Reservation is approximately 27,000, including about 5,000 members of the Tribe and some 1,500 Indians of other tribes (*ibid.*).

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[1] There remains, of course, the threshold jurisdictional question already briefed by the United States. See Motion to Dismiss filed by the United States, February 1979.

So, also in the event this Court were to reverse the district court's ruling and hold that Washington may impose its cigarette and sales taxes on Reservation transactions to non-Indians, there would remain enforcement issues—notably whether the State may seize cigarettes in the possession of Indians on trust lands within the Reservation or cigarettes en route to the Yakima Tribe destined for ultimate resale to both Indians and non-Indians. But these questions were mooted by the district court's basic holding and are not ripe for consideration on this appeal.

The State of Washington has assumed civil and criminal jurisdiction over unrestricted fee land within the Reservation pursuant to the Act of August 15, 1953, Pub. L. No. 280, 67 Stat. 588; Wash. Rev. Code Ann. §37.12.010 (West 1964). This assumption of jurisdiction does not apply, however, to Indians when on their tribal lands or allotted lands held in trust by the United States, except with respect to the following categories of matters: (1) compulsory school attendance; (2) public assistance; (3) domestic relations; (4) mental illness; (5) juvenile delinquency; (6) adoption proceedings; (7) dependent children; and (8) operation of motor vehicles upon the public streets, alleys, roads and highways. See *Washington* v. *Yakima Indian Nation*, No. 77-388 (Jan. 16, 1979).

2. The Yakima Nation owns and operates several tribal enterprises. With the exception of an Aircraft Sales, Charter and Service Enterprise, which it operates as a corporation off the Reservation and with respect to which it pays applicable state taxes, these enterprises are all operated by the Tribe on the Reservation and are wholly owned by the Tribe (A. 175–176). The surplus income is used for tribal purposes. These enterprises, moreover, provide on-reservation employment for tribal members and other Indians and non-Indians. The majority of the employees are tribal members (*id.* at 175). The tribal enterprises include a Land Enterprise, Timber Enterprise, Furniture Manufacturing Enterprise, Fish and Food Processing Enterprise, and a Newspaper Enterprise (*id.* at 176). The sales of these businesses exceed $12,000,000 annually (*ibid.*).

The Tribe also operates an enterprise which wholesales cigarettes and tobacco products to members on the Reservation. The Nation purchases cigarettes and other tobacco products from suppliers outside of the State of Washington. The cigarettes are then shipped directly to the Tribe by licensed and bonded common carriers over the public highways of the State of Washington. The Nation obtains possession of the



cigarettes at the Yakima Indian Nation Industrial park which is located entirely within the Yakima Reservation (A. 172–173). These cigarettes and tobacco products are resold and delivered to the individually owned smoke shops by tribally owned vehicles where they are sold at retail to members of the Tribe and other customers (*ibid.*). No records are kept with respect to the numbers of cartons of cigarettes or the value of tobacco products purchased by non-members of the Tribe, nor do the licensed retailers limit sales of cigarettes to non-members (*ibid.*)

All persons licensed by the Tribe to sell cigarettes and tobacco products at retail within the exterior boundaries of the Yakima Reservation are enrolled members of the Tribe. The land upon which these licensed Indian retailers conduct their retail business is land allotted to individual Indians but held in trust by the United States or otherwise restricted against alienation (A. 173). The Tribal Council has enacted a series of Tribal Ordinances to regulate and tax the sale of cigarettes and tobacco products on trust land within the Reservation. Ordinances of October 8, 1970; January 30, 1974; September 10, 1974 (J.S. App. 142–145; A. 172). All persons engaged in the business of selling cigarettes or other tobacco products on trust land must obtain a permit from the Tribe. The permittee must obtain his cigarettes from the tribal enterprise, employ only members of the Tribe, and sell at a uniform price (*ibid*). For a permit, the Tribe charges a fixed fee of $25 per year and 2.25 cents per package of cigarettes sold (*id.* at 143). In 1975, the Tribe collected $278,408.24 from the cigarette and tobacco products mark-up and tax (*id.* at 177).

The funds received by the Tribe from its cigarette, tobacco products, and sales tax, plus profits from its cigarette and tobacco products wholesaling enterprise, are available for expenditure by the Tribe in support of its governmental functions (A. 177). Some of these are financed by joint federal-tribal programs expending

both federal and tribal funds (*ibid.*). These include the basic functions of a local government, among them law enforcement, education, zoning, planning, and housing programs (A. 177–182).

3. The State of Washington has enacted several taxing schemes which are at issue in this case. The State imposes an excise tax on cigarettes in the amount of $1.60 per carton of 200 cigarettes (A. 182). Prior to 1972, the state tax was levied on articles "sold, used, consumed, handled * * * or distributed within this state," and the tax was collected from "the person who first sells, uses, consumes, handles * * * or distributes within the state." Wash. Rev. Code Ann. §82.24.080 (West 1964). A 1972 Amendment to the statute added possession as a legal incident of taxation, but exempted possession of up to two cartons of cigarettes from taxation. 1972 Wash. Ex. Sess. Laws, ch. 157, §§6 and 7. As construed by the Washington State Supreme Court in *Tonasket* v. *State*, 84 Wash. 2d 164, 525 P.2d 744 (1974), this provision permitted the Tribe to possess unstamped cigarettes for resale to its tribally licensed retailers and permitted these retailers to sell no more than two cartons of cigarettes to non-Indians without affixing excise tax stamps or collecting the cigarette excise tax (A. 183).

While this suit was pending, a 1975 Amendment repealed the two carton exemption from taxation based on possession of cigarettes. 1975 Wash. 1st Ex. Sess. Laws, ch. 22. The Tribe remains exempt from cigarette excise tax liability and may possess unstamped cigarettes for resale to its tribal members (A. 184). However, the statute requires licensed Indian retailers to collect cigarette excise taxes with respect to sales to non-members and to remit the tax to the State (*id.* at 183–184). The aggregate of taxes, both tribal and state, imposed upon the sale of cigarettes by licensed retailers of the Tribe amounts to $2.065 per carton (*id.* at 185). Assuming that all applicable cigarette and sales taxes are in fact collected, the parties estimated in 1977 that



the average selling price of a carton of cigarettes sold by a tribal retailer to a non-member would be $5.79 per carton; the average selling price of a carton of cigarettes sold by a tribal retailer to a member of the Tribe would be $3.95 per carton; the average selling price of a carton of cigarettes sold off the Reservation by non-Indian retailers would be $5.00 per carton (*id.* at 185–186). The deposition of Cyril C. Hermann (*id.* at 219–246) establishes that the price differential caused by the imposition of both state and tribal taxes is sufficient to preclude sales by tribal retailers to non-Indians.

The state retail sales tax applies to each retail sale, including cigarette sales, within the State unless constitutionally prohibited.[2] Wash. Rev. Code Ann. §82.08.020 (West 1964) (J.S. App. 106). The tax is imposed upon the buyer, and is collected by the seller. Wash. Rev. Code Ann. §82.08.050 (West 1964). If, however, the seller fails to collect the tax, he is personally liable to the State for the omitted tax (*ibid.*). Until 1974, sales by Indian retailers on the Reservation were exempted from the sales tax collection requirement.

On August 23, 1974, the State, through an emergency provision, amended its regulations pertaining to the state sales tax (A. 183–184). The amendment removed the tribal retailers' exemption from sales tax collection responsibility on sales to non-Indians. The State mailed notices to the individual Indian retailers detailing this change and enclosing forms which were required to be completed and returned to the State within thirty days. The notices threatened that failure to comply with the registration and reporting requirements on retail sales would expose the individual licensed Indian retailers to such enforcement provisions as Washington law prescribed (*id.* at 183–184).

On November 12, 1976, effective a month later, the State further amended its regulations pertaining to

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[2] The state does not attempt to extend its sales tax to sales from the Tribe's Timber and Land Enterprises (A. 176).

state cigarette and sales taxes on sales by licensed Indian retailers of the Tribe to non-members (A. 184). That regulation, WAC 458-12-193, among other things, requires tribal retailers to collect and remit state sales and cigarette taxes on sales of cigarettes to non-members. On November 24, 1976, the State issued its Excise Tax Bulletin 504.08.192 outlining procedures to implement WAC 458-12-192 and to provide additional explanation of certain provisions of that administrative rule. The Bulletin requires licensed retailers of the Tribe to register with the State (without payment of registration fee) and to keep certain records documenting the tax-exempt status of sales to members of the Tribe. The following records are required of all retailers, including licensed retailers of the Tribe: (a) name of the Indian purchaser; (b) the tribal affiliation of the purchaser; (c) the Indian reservation to which or within which delivery was made, or within which retail services were rendered; (d) the dollar amount of the sale; and (e) the date of the sale (*id.* at 184-185). Finally, in the event unstamped cigarettes and tobacco products continue to be sold by licensed Indian retailers to non-members without the affixing of tax stamps and collection of sales tax, the State threatens to seize unstamped cigarettes and tobacco products in the possession of the Yakima Indian retailer (*id.* at 183).

The State has also threatened to seize cigarettes owned by, or consigned to, the Yakima Nation outside the boundaries of the Yakima Reservation. It presently relies upon a statute which declares contraband untaxed cigarettes found within the State in the hands of those not entitled to possess them. Wash. Rev. Code Ann. §82.24.250 (West 1964). Although Indian tribes are entitled to possess untaxed cigarettes, (*ibid.*), the State contends that it has the power to revoke permission to Indian tribes to possess such cigarettes if tribal operations result in untaxed sales to non-Indians. Wash. Rev. Code. Ann. §82.24.130 (West 1964).



4. At the outset of this litigation, state officers seized shipments consigned to the Yakima Nation, under a tax warrant and levy procedure. On May 5, 1972, the State of Washington assessed a tax of $304,582.40 and a penalty of $304,582.40 plus interest against the Yakima Nation "by virtue of Chapters 82.04 through 82.32 R.C.W." (A. 140). A "Notice and Order" was served on at least six interstate common carriers, notifying them that the Tribe owed the State $650,333.88 and ordering them to deliver to the State any tribal property in their possession (*id.* at 140-141). Attached to the notice was a statement that "[t]he notice and order to withhold and deliver shall constitute a continuing levy on * * * property until the department [of revenue] shall issue its release of such levy." Pursuant to the "Notice and Order," a shipment of cigarettes being transported from the State of Idaho to the Yakima Nation Industrial Park by common carrier was seized by the State and sold at public auction (A. 141). As a result of seizures of unstamped cigarettes bound for the Yakima Indian Reservation, the Tribe ceased its tribal wholesaling enterprise in January 1973, for a period of ten months, until the issuance of a temporary restraining order in this cause on November 5, 1973, restraining the State from interfering in the conduct of the tribal cigarette enterprise (*id.* at 147).

The State now concedes that it cannot assert liability against the Yakima Nation for state cigarette taxes (A. 187).

5. As originally filed by the United States on July 18, 1973, the *Yakima* suit sought to restrain the State from taking action against the property and transactions of the Yakima Tribe. In particular, the request for injunctive relief was addressed to the State's seizure of cigarettes consigned to the Tribe from interstate common carriers (A. 143).

On July 19, 1973, the United States requested that a three-judge court be convened because the complaint sought injunctive relief against the enforcement of state

statutes on the ground of their unconstitutionality (A. 145). On July 20, 1973, District Judge Powell certified the necessity for a three-judge court because the prayer in the complaint asked for an injunction against the application of "the revenue laws of the State of Washington on the Yakima Indian Reservation as an unconstitutional interference of interstate commerce and deprivation of property without due process of law" (*id.* at 146).

On November 5, 1973, Judge Powell entered a temporary restraining order barring the State from acting to assess a tax on or seize cigarettes, tobacco products or their containers being shipped to the Yakima Nation in interstate commerce or distributed by the Tribe to its licensed retailers (A. 147). On April 24, 1974, the Confederated Bands and Tribes of the Yakima Indian Nation filed a complaint in intervention requesting, in addition to declaratory and injunctive relief, money damages for interference with the tribal enterprise (*id.* at 155). On September 6, 1974, a three-judge court entered a preliminary injunction restraining the State from taxing or seizing cigarettes being shipped to the Yakima Nation or distributed to its tribal retailers (*id.* at 156). On October 4, 1974, the United States filed an amended complaint, asserting that the suit was filed on behalf of licensed tribal retailers as well as the Yakima Nation, and challenging the amendment, on August 23, 1974, of Washington state sales tax regulations which removed the state sales tax exemption enjoyed by Indian retailers. The amended complaint requested declaratory and injunctive relief against state regulation and taxation of the activities of licensed Indian retailers as well as the Yakima Nation (*id.* at 158–165).

After consolidation of the *Yakima* case and the *Colville* case for hearing, the district court held the cases in abeyance pending this Court's disposition of *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976); and *Bryan* v. *Itasca County*, 426 U.S. 373 (1976). Following the decisions in those cases, the district court entered a single opinion (J.S. App. 1–65). In both cases, the court ruled that the three-judge court had been properly convened because Washington's application of state statutes authorizing seizure of property to tribally owned goods moving in interstate commerce raised substantial constitutional questions under the Interstate Commerce Clause (*id.* at 13–14, 47–51).



Turning to the merits, the court held that imposition of the state cigarette excise tax on sales taxed by the Tribes was an unlawful interference with tribal self-government and was preempted by the tribal ordinances (J.S. App. 34, 41, 52).[3] In the *Yakima* case, the court held that insofar as the state sales tax applied to on-reservation cigarette sales, it was preempted by the Yakima tribal ordinance (*id.* at 52–53). In other respects, however, the sales tax was upheld (*id.* at 53–58). In both cases, the court struck down the recordkeeping and reporting requirements imposed by state regulations as they relate to transactions held exempt from the substantive tax (*id.* at 29–30, 57–58). The court issued separate judgments implementing these conclusions (*id.* at 66–70, 71–74). In both cases, Circuit Judge Kilkenny dissented from the majority's ruling enjoining the imposition of Washington's cigarette and sales taxes on sales to non-Indians (*id.* at 59–65, 70, 74).

## ARGUMENT

### A. *INTRODUCTION AND SUMMARY*

These cases present one aspect of a recurring question vital to the future of the surviving American Indian Tribes: When, if at all, are on-Reservation activities or

[3] The court also concluded that the state tobacco products taxes constituted unlawful direct taxation of Indians because the taxes fell on the tribal retailer and not the consumer (*id.* at 23, 52). The State does not challenge this ruling.

transactions involving both Indians and non-Indians exempted from State regulation or taxation? It is no exaggeration to say that on the answer depends, in large measure, the fate of the present policy of restoring the tribes to self-sufficient, self-governing, status in our society. Nor is this consequence legally irrelevant. When the Congress, having undoubted power to do so, has fixed upon a policy in Indian affairs, it is surely not improper to seek a result that will not defeat the legislative objective. Yet, even so, we cannot ask the Court itself to fashion new arrangements. The issue must of course be resolved within the existing framework of fact and law.

History has restricted the scope of the argument. Thus, it is far too late in the day to speak of an Indian Reservation as a sealed enclave, wholly separate from the State in which it is located. Because Reservations have long since been penetrated by non-Indians and, in many cases, the resident population is no longer confined to tribal members, the legitimate interest of the State in some activities there has been recognized. But it does not follow that Reservation boundaries are today no obstacle to State jurisdiction, nor that subsisting tribal sovereignty is no longer in any sense territorial. The fact is that *both* the tribe and the State often have different, and sometimes competing, interests over events occurring within a Reservation and no all-or-nothing solution will serve. Here, as elsewhere, the rule must be "adjustment and accommodation" (*Washington* v. *Fishing Vessel Ass'n*, Nos. 77-983, 78-119 and 78-139 (July 2, 1979), slip op. 22).

The question remains how such an apportionment of jurisdiction within a Reservation shall be made. It is suggested that, in the area of taxation, the dividing line is simply that the tribe may tax its own members while the State may tax all others, so that the validity of a State tax, even as it reaches transactions on a Reservation, is simply determined according as the "legal incidence" falls on Indians or non-Indians. This, it is argued, is settled, as to the exemption in favor of Indians or Indian property within a Reservation, by *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976), and *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), and, as to State power to tax sales to non-Indians on a Reservation when they bear the legal burden, by the final holding of *Moe*, *supra*, 425 U.S. at 481-483. And, for the proposition that tribes may not tax non-Indians, appellants invoke *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), where the Court held the tribe without jurisdiction to punish non-Indians committing offenses against tribal members on the Port Madison Reservation.



There is, of course, no such bright line. Nor can there be. Total reliance on a "legal incidence" test would lead to very arbitrary results, wholly at odds with the considerations that ought to determine whether State or tribal interests are paramount. Thus, here, the State concedes that its tobacco products tax cannot be imposed on Reservation transactions to non-Indians because the district court concluded (J.S. App. 23 n.15) that its incidence fell upon the Indian Dealer (Wash. Br. 55 n.40), although, in part at least, the tax is otherwise indistinguishable from that imposed on cigarettes. So, also, undue deference to State characterization invites contrived rationalizations, as the present case illustrates. Indeed, while the burden of Washington's cigarette tax normally falls on the seller—which in the present context would render it invalid—the district court felt itself bound here to accept an exceptional rule to the effect that, uniquely in sales by Indians to non-Indians, the incidence of the tax falls on the purchaser (J.S. App. 20-24).

This Court has never followed such a mechanistic approach in deciding whether State intervention in Reservation affairs ought to be condoned. Neither by accident, nor by design, can a State so easily invade a domain still reserved for tribal regulation. We put to one

side instances in which there is an obvious "conflict with the federal enactments." (*United States* v. *McGowan*, 302 U.S. 535, 539 (1938)). For the usual case in which State regulation or taxation directly reaches non-Indians within a Reservation but also touches tribal interests, the controlling principle was summarized two decades ago in *Williams* v. *Lee*, 358 U.S. 217, 220 (1959), and has since been reiterated without deviation: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." To this basic rule we need only add that State jurisdiction will also be defeated if it invades an area preempted by federal regulation, or tribal regulation authorized by federal law. See *Warren Trading Post* v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Fisher* v. *District Court*, 424 U.S. 382 (1976).

Needless to say, these precepts are not self-executing and their application in various factual contexts may produce differing results. Thus, for instance, it is not enough to notice that both this case and *Moe* involve the issue whether a State cigarette tax validly may be imposed on Reservation sales to non-Indians. For two principal reasons, we believe *Moe* does not control here.

First, in *Moe*, although imposition of the State tax deprived the Indian retailers of "[a] competitive advantage" (425 U.S. at 482), there was no finding—nor even any claim—that the Reservation "smoke shops" were thereby put out of business. In contrast, the court in the present case expressly found that the substantial transactional taxes imposed by Washington, when added to the tribal tax, would "destroy" the Indian enterprise.[4] Second, whereas in *Moe* only private Indian

[4] It is noteworthy that the court rejected the claim of exemption from sales taxes in respect of other Reservation businesses because it found insufficient evidence of a like impact on these tribal enterprises (J.S. App. 50–51, 54–55).



businessmen were significantly affected, here the Tribe itself is immediately deprived of essential governmental revenues, and its taxing and regulatory authority is effectively abrogated, if the State may, through its taxes, frustrate a Reservation enterprise.

In sum, in this case, unlike *Moe*, there is an *actual*, and not merely potential, conflict between two *incompatible* assertions of *governmental* power. Here there is no blinking the fact that the action of the State constitutes a serious and direct interference with tribal self-government and, at the same time, conflicts with the policy of federal law to encourage the self-sufficiency of Reservation tribes. In these circumstances, established precedents tell us the State law must give way.

2. The balance of our brief is devoted to demonstrating that the particular State taxes invalidated in the *Yakima* case were rightly held to infringe on the tribe's powers of self-government and to invade a domain preempted by or under authority of federal law.

*a*. With respect to the question of interference with tribal self-government, we stress that the tribe's retained powers embrace a measure of territorial jurisdiction over the Reservation. We examine the cases in this Court and conclude that, in appropriate circumstances, tribal authority may reach the activities of non-Indians within a Reservation when they importantly affect tribal interests, and that, when the tribe so exercises its powers, it may displace State jurisdiction. This is such an instance, we submit. In light of the tribe's involvement in the on-Reservation cigarette enterprise, its comprehensive regulation and taxing of cigarette transactions, and its dependence on the revenues thereby generated, the incompatible State taxes plainly interfere with tribal prerogatives.

*b*. This conclusion is buttressed, we believe, by considering the overriding federal policy protecting tribal authority within Reservations against undue State intrusion. We consider the relevant treaty and statutory

provisions that evidence this policy and conclude that they confirm, if need be, the power of the Yakima Nation to take the actions involved here and evidence a congressional intent that the exercise of such authority by the tribe shall preempt conflicting State regulation.

### B. *INTERFERENCE WITH TRIBAL SELF-GOVERNMENT*

We submit the court below correctly held that, as applied to transactions in cigarettes on the Yakima Reservation, Washington's excise and sales taxes impermissibly interfere with the Tribe's right of self-government. In order to test this proposition, it is useful, first, to attempt to define, so far as is relevant to the case, the right which we say is here invaded. We will then notice how the challenged taxes affect its exercise.

1. This Court has recently affirmed that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). The implicit divestiture affects the freedom to alienate land to non-Indians, the prerogative to engage in foreign relations and the power to try non-Indians in tribal courts. *Id.* at 326. But "the powers of self-government" have not been surrendered. *Ibid.* To that extent, the Indian Tribes remain sovereign. *Id.* at 322-323.

What does that sovereignty embrace? We should not expect to find the full answer spelled out in federal legislation since the sovereignty of Indian tribes is the residuum of aboriginal independence, not the consequence of "any delegation to them of federal authority." *Id.* at 328. To be sure, Congress may restore at least some of the tribal powers lost when the tribes became "dependent" or may delegate to tribal governments some aspects of its own authority. See *Oliphant* v. *Suquamish Indian Tribe*, *supra*, 435 U.S. at 212;



*United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975). So, also, Congress has always been free to diminish, or even extinguish, tribal powers, and any such enactment must of course be noticed. But, except as the Indian Civil Rights Act makes applicable certain basic "constitutional" rules, the whole thrust of recent legislation has been to encourage the exercise of tribal self-government. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 62-72 (1978); *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 388-389 n.14. Indeed, as we shall have occasion to notice (*infra*, pages 31-34), several federal statutes confirm the continuing vitality of tribal sovereignty and revive lost or dormant powers. See *Fisher* v. *District Court*, *supra*, 424 U.S. at 390. For the most part, however, tribal powers exist quite independently of treaties or statutes recognizing them. *United States* v. *Wheeler*, *supra*, 435 U.S. at 327-328.

The sovereign character of Indian tribes cautions us not to confine our focus to the federal statute book. But it also tells us what *kinds* of powers tribes possess. Of course, tribes may determine their membership, enact rules of conduct for the members, and levy assessments against them, on pain of suspension or expulsion. So may any private club. And, like any chartered association or corporation, tribes may engage in commercial enterprises. Yet, Indian tribes "are a good deal more than 'private, voluntary organizations.'" *United States* v. *Mazurie*, *supra*, 419 U.S. at 557. Nor are they mere creatures of a superior sovereignty, like cities or counties or territories, exercising only delegated powers. *United States* v. *Wheeler*, *supra*, 435 U.S. at 319-322, 329. Indian tribes enjoy sovereignty in their own right, which carries with it immunity from suit, even as against States of the Union (*Puyallup Tribe* v. *Washington Game Department*, 433 U.S. 165, 172-173 (1977)), as well as a unique exemption from the restraints imposed on all other domestic sovereignties by the Constitution (see *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 56, 71). It must follow that, except

as surrendered or restricted by Act of Congress, the tribes possess all the usual *governmental* powers.

There is no reason to doubt that, subject only to federal supervision, the tribe may exercise over its members all the police powers that pertain to State governments. Thus, a tribe may establish legislative, executive and judicial organs. It can make laws and enforce them in its own courts. See, *e.g.*, *Fisher* v. *District Court*, *supra*; *United States* v. *Wheeler*, *supra*, 435 U.S. at 322; *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 55–56, 59–60, 62–66. It may regulate and license. It may provide all usual governmental services and dispense welfare benefits. To raise necessary revenues, the tribe may itself administer tribal resources or, through lease or license, permit others to do so. And it may impose and collect taxes.

2. What is more, as in the case with all sovereigns, the powers of Indian tribes are, in important aspects, *territorial*.

With respect to some matters, Congress has imposed federal control or permitted the State to assume jurisdiction within Indian Reservations. *E.g.*, 18 U.S.C. 1152–1153, 1162; 25 U.S.C. 1321–1322. But, otherwise, the general rule is that "the Indians on it [are] largely free to run the reservation and its affairs." *Warren Trading Post Co.* v. *Arizona State Tax Comm'n*, *supra*, 380 U.S. at 690. Whether, in any particular instance, the authority of a tribe over its territory is a residue of aboriginal sovereignty or derives more immediately from federal treaties and statutes, it may not be necessary to decide. See, generally, *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 168–173. What matters is that, even today, Reservation boundaries define an area within which the tribe has special prerogatives and which the State cannot enter except by leave of Congress or for very limited purposes.

Even when only members are involved, tribal authority, or the power of enforcement, sometimes depends upon whether the Reservation is the situs of the subject property or activity, or whether the parties reside there. See, *e.g.*, *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n. 2 (1975). *Fisher* v. *District Court*, *supra*, 424 U.S. at 389 & n.14. And State jurisidiction over Indians likewise usually turns upon their being outside "Indian country." Compare *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, with *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973). But the tribe's authority with respect to events occurring on the Reservation is not restricted to members. At least insofar as the welfare of the tribe is directly affected, tribal power extends to prohibiting or regulating activities within the boundaries of the Reservation.



This is, indeed, the teaching of the landmark case of *Williams* v. *Lee*, *supra*. When the Court there spoke of "the right of reservation Indians to make their own laws and be ruled by them" (358 U.S. at 220), and "the right of the Indians to govern themselves" (*id.* at 223), it was in no restrictive sense. These passages occur in the context of a holding that tribal courts, rather than the courts of the State, had exclusive jurisdiction of a civil dispute between an Indian and a non-Indian trader. As this Court said (*ibid.*):

> It was immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. * * * The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Nor does *Williams* v. *Lee* stand alone. It is instructive to notice first those very few situations in which, absent a controlling Act of Congress, the Court has condoned the application of State law within a Reservation. One series of cases involved the murder of one non-Indian by another. *United States* v. *McBratney*, 104 U.S. 621 (1881); *Draper* v. *United States*, 164 U.S. 240 (1896); *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946). As the last of them makes clear, the

rationale of these decisions is that such crimes, "which happened to take place upon an Indian reservation, * * * did not directly affect the Indians." 326 U.S. at 501. See, also, *id.* at 500. So, also, in the few cases upholding State or territorial taxes imposed on non-Indian property located within a Reservation, the Court has stressed that the effect on the tribe was either wholly absent (*Utah & Northern Ry.* v. *Fisher*, 116 U.S. 28, 31-32 (1885); *Maricopa & Phoenix R.R.* v. *Arizona*, 156 U.S. 347, 351 (1895)) or could be dismissed as "too remote and indirect" (*Thomas* v. *Gay*, 169 U.S. 264, 273, 275 (1898)) or as a "minimal burden" (*Moe* v. *Salish & Kootenai Tribes*, *supra*, 425 U.S. at, 483).

These exceptions in favor of State jurisdiction have been described as "quite limited." *DeCoteau* v. *District County Court*, *supra*, 420 U.S. at 427 n.2. They adjust the usual rule "to take account of the State's legitimate interests in regulating the affairs of non-Indians," but only "up to the point where tribal self-government would be affected." *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 171, 179. Most recently, this Court restated the prevailing rule: absent a congressional cession of jurisdiction, "state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Washington* v. *Yakima Indian Nation*, No. 77-388 (Jan. 16, 1979), slip op. 6. It would be wholly wrong to fashion out of these exceptions a general principle that non-Indians on a Reservation are always subject to exclusive State authority even when their activities importantly affect tribal interests. On the contrary, as this Court summarized the matter in *McClanahan*, *supra*, 411 U.S. at 179, "cases applying the *Williams* test have dealt principally with situations involving non-Indians" in which "both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions," and, of course, *Williams* v.



*Lee* itself sufficiently shows that such a conflict is resolved in favor of the tribe when the welfare of the Indians is significantly implicated. See, also *Warren Trading Post* v. *Arizona Tax Comm'n*, *supra*, 380 U.S. at 686-687, 690, as explained in *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 170 & n.6.

This view was recently confirmed in a case upholding tribal power to regulate the sale of intoxicants by a non-Indian within "Indian country." *United States* v. *Mazurie*, *supra*. In sustaining the tribe's authority over a non-Indian, the Court noted that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members *and their territory*" (*id.* at 557; emphasis added) and reproduced the passage just quoted from *Williams* v. *Lee* (*id.* at 558). To be sure, the Court has disapproved an attempt by a Tribe to assert *criminal* jurisdiction over a non-Indian. *Oliphant* v. *Suquamish Indian Tribe*, *supra*. But that decision may be taken as announcing an exception, not the rule. Indeed, since *Oliphant*, the Court has expressly re-affirmed *Williams* v. *Lee* (*e.g.*, *United States* v. *Wheeler*, 435 U.S. 313, 324 (1978); *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 56, 59, 65-66)), specifically noting its application to Reservation transactions involving non-Indians (436 U.S. at 65-66).

3. This understanding is relevant to answering the question whether State action interferes with the tribal right of self-government. Because the tribes are not private associations, but sovereigns wielding governmental powers, and because, with only limited exceptions, their authority is territorial as well as personal, it is not enough to ask if the intervention of the State disturbs some aspect of the "internal" relations between one member and another. The teaching of *Williams* and *Mazurie* is that relations between Indian and non-Indians on the Reservation are also within "the authority of Indian governments." What is more, the

intrusion of State law must be judged not only by its direct affect on tribal members as individuals, but according as it may impair the tribe's ability to raise revenues to accomplish governmental functions, may prejudice the status of tribal institutions, or may diminish the tribe's authority over its territory.

So viewed, it is plain that the right of the Yakima Nation to exercise the powers of government within the Yakima Reservation is adversely affected by the State taxes on cigarette transactions occurring there. Indeed, significant interference can be identified in at least three respects.

*a*. First, the State taxes purport to reach events which occur wholly on the Reservation. Washington is not taxing a use within the State, but outside the Reservation. Both the cigarette excise tax and the sales tax attach at the moment of purchase by a non-Indian and apply even if the cigarettes never leave Indian country. Permanent or temporary residents of the Reservation who consume the cigarettes there are subject to the exactions unless they are members of the tribe. In effect, except for tribal members, the Reservation boundary is ignored as an irrelevancy.

This, in itself, is a serious challenge to the territorial integrity of the Reservation and to the tribe's authority there. Just as tribes are not the State's creatures and enjoy sovereign prerogatives that derive from an independent source (*United States* v. *Wheeler*, *supra*), so, also, their Reservations are not part of the State in the same sense as cities or other State political subdivisions. State jurisdiction does not automatically attach to Indian country. For most purposes today, not only the United States, but also the affected tribe, must consent. 25 U.S.C. 1321-1326. To be sure, in special circumstances, State law may cross into Indian country without express authorization. But that is only when the State interest is, relatively, so much more substantial as to outweigh any adverse affect on tribal prerogatives. That is not the case here.



Of course, the State, for practical reasons, wishes to put the burden of collecting its cigarette and sales taxes on the Indian seller. Cf. *National Geographic* v. *Cal. Equalization Bd.*, 430 U.S. 551, 555 (1977). But such an interest would not justify the challenged scheme if the Reservation were assimilated to a neighboring State. Washington could not require Oregon sellers having no presence in the former State to pre-collect taxes imposed on the consumption of imported goods. *Id.* at 558-559. Much less could Washington purport to tax the sales elsewhere of goods that never entered the State. Moreover, it is doubtful if Washington could fail to give credit for the transactional tax already paid to the State of sale. See *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 331 (1977); *Japan Line, Ltd.* v. *County of Los Angeles*, No. 77-1378 (Apr. 30, 1979), slip op. 12. In the interstate context, Washington presumably would be held to be impermissibly attempting to appropriate "tax resources properly belonging to the state where the event occurs." *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 343 (1954). While the same inhibitions may not be fully applicable here, the analogy at least suggests how we should resolve the present conflict between two incompatible claims to taxing jurisdiction.

*b*. Application of the challenged taxes to on-Reservation transactions trespasses on the tribe's legitimate claim of limited territorial sovereignty. But that is not all. The intrusion of State law in this case directly impinges on tribal governmental functions. By legislative decision, the tribe regulates and taxes the sale of cigarettes within the Reservation. The superimposition of the State taxes on the same transactions effectively nullifies the tribal scheme. The practical consequence is that, in this respect, the tribe's governmental authority is destroyed. Obviously, the interference here is far more serious, and more intimately implicates tribal prerogatives, than the jurisdictional question which courts should try a private civil dispute arising

on the Reservation. Accordingly, this case seems a fortiori from *Williams* v. *Lee*.

*c*. Finally, the State taxes strike deeply at the tribe's capacity to raise essential governmental revenues. All government, of course, costs money, and independent government requires independent revenues. Like most tribes, the Yakima Nation cannot raise the funds necessary to carry on effective government without tribally operated or licensed enterprises that cater primarily to non-Indians, and the economic viability of most such businesses depends upon at least some exemption from State taxes.

The immunity which members enjoy in their dealings with each other is of little help in providing tribal revenues. Tribal self-sufficiency can be achieved only by trade, or other transactions, with more affluent non-Indian neighbors, including those residing on the Reservation. This may not justify exempting off-Reservation activities. See *Mescalero Apache Tribe* v. *Jones*, *supra*. But it is not immediately apparent why the tribes should not be free of the disabling burden of State taxation for what occurs within their own territory. Unless such an exemption is recognized, it is, for many tribes, little more than idle talk to speak of "self-government," or "self-determination," or "self-sufficiency." To deprive the tribes of their ability to raise revenue—otherwise than by alienating depleting tribal assets—is the surest means to destroying autonomous Indian governments.

### C. *FEDERAL PREEMPTION*

We have assumed that, so far as it subsists, the right of the Yakima Nation to govern within its diminished territory free of State interference is not a privilege conferred by federal law, but, rather, the residuum of aboriginal sovereignty—the role of treaties and statutes being primarily to limit, territorially or otherwise, the extent of tribal autonomy. That appears to be the



teaching of *United States* v. *Wheeler*, *supra*, and seems to be implied by many other statements in this Court.[5] This approach is, moreover, consistent with the Court's tradition of treating interference with the right of tribal self-government as an independent ground for excluding the application of State law, separate from a conflict with federal legislation. *E.g.*, *Kake Village* v. *Egan*, 369 U.S. 60, 75 (1962); *Mescalero Apache Tribe*, *supra*, 411 U.S. at 148; *McClanahan*, *supra*, 411 U.S. at 179–180; *Moe*, *supra*, 425 U.S. at 483.

Even here, of course, one can speak of "preemption." The analysis is simply that the Constitution itself—as exemplified in the Indian Commerce Clause—ousts State jurisdiction over all matters within Indian Reservations that significantly touch tribal interests and reserves that area for federal regulation. This is, in effect, the approach of *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 540 (1832), as "modified" in *Wil-*

[5] Illustrative passages include the following: "[*A*]*bsent governing Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (*Williams* v. *Lee*, *supra*, 358 U.S. at 220; emphasis added); "If this power [of Indian governments over their reservations] is to be taken away from them, it is for Congress to do it " (*id.* at 223); "in the special area of state taxation, *absent cession of jurisdiction or other federal statutes permitting it*, there has been *no satisfactory authority* for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation" (*Mescalero Apache Tribe* v. *Jones*, *supra*, 411 U.S. at 148, (emphasis added), quoted in *Moe* v. *Salish & Kootenai Tribes*, *supra*, 425 U.S. at 475–476, and *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 376); and "[N]o federal statute sanctions this interference with tribal self-government" (*Fisher* v. *District Court*, *supra*, 424 U.S. at 388).

So, also, in more recent cases, the Court has made clear that *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, announces a general rule which does not turn on particular treaty or Enabling Act provisions. See *Mescalero Apache Tribe*, *supra*, 411 U.S. at 148; *Moe*, *supra*, 425 U.S. at 477; *Bryan*, *supra*, 426 U.S. at 375–377 & n.2.

*liams* v. *Lee*, *supra*, 358 U.S. at 219. Or, more modestly, it can be said that State law is pre-empted when the tribe, acting within the sphere of its residual sovereignty, has "occupied the field." Cf. *Fisher* v. *District Court*, *supra*, 424 U.S. at 390. In neither case, however, is it strictly necessary to invoke "particular treaties and specific federal statutes"(*Mescalero Apache Tribe*, *supra*, 411 U.S. at 148). Rather, the doctrine has been described as deriving from "a general pre-emption analysis" that builds on broad principles of allocation of powers and duties with respect to Indians as between federal and State authority. See *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 376 n.2.[6]

Thus far, as petitioners have noted, objections to State action based on "interference with tribal self-government" and "federal preemption" may be no more than two formulations of the same challenge. This overlap is especially likely to be assumed when, as here, the tribe is actively exercising its powers in a way that leaves no room for State intervention. But, in our view, the present case also involves a separate claim of preemption, premised on more specific sources of federal law. Indeed, as this Court has remarked, that is the usual situation. *McClanahan*, *supra*, 411 U.S. at 172 n.8.

Before turning to the relevant treaty and statutory provisions, however, we note the limited purpose for which they are invoked. There is no claim here of an explicit direct conflict between federal and State law. The immediate confrontation is with a tribal ordinance. We have argued that, since the tribe was acting within its reserved powers, this alone precluded incompatible State action. But it is an additional reason for holding

[6]To this extent, it would seem that *Bryan* and *Wheeler* have qualified the suggestion in *Moe* (425 U.S. at 481 n.17) that "existing federal statutes," rather than the Constitution, are inevitably the immediate source of a valid preemption claim in Indian matters.



the State's interference preempted if the tribal action "implements an overriding federal policy." *Fisher*, *supra*, 424 U.S. at 390. Accordingly, we undertake a brief examination of the federal treaty and statutory provisions that bear on the situation of the Yakima Nation and its Reservation.

1. The status of the Yakima Indian Nation has very recently come to the Court's notice. See *Washington* v. *Yakima Indian Nation*, *supra*. Formal recognition of the confederated bands and tribes as a governmental unit dates from 1855 when the United States signed a treaty with representatives of some 14 tribes who ceded most of their lands, reserved a tract of more than one million acres for their "exclusive use and benefit," and agreed to be considered "as one nation," with a single "head chief." Slip op. 5; Treaty with the Yakimas, Preamble, Arts. II and V, 12 Stat. 951, 952, 953. Although the tribes "acknowledge[d] their dependence upon the government of the United States" and relinquished the prerogative of conducting foreign affairs (Art. VIII, 12 Stat. 954), the treaty assumed the Yakima Nation's continuing domestic sovereignty over its reserved lands, from which all white men were excluded except Indian agents and those admitted by permission of the tribes. Art. II, 12 Stat. 952.

It is thus clear that the Yakima Nation, no less than the Navajo Tribe involved in *Williams* v. *Lee*, *Warren Trading Post* and *McClanahan*, early was recognized as enjoying the usual "authority of Indian governments over their reservations." *Williams* v. *Lee*, *supra*, 358 U.S. at 223. Their territory was "set apart" and, subject only to federal approval, the tribe was expressly empowered to exclude non-Indians or to admit them on conditions. See *Morris* v. *Hitchcock*, 194 U.S. 384 (1904). That this was a matter of importance to the Yakimas has been noted in this Court: "They feared the encroachments of the white man. Their fears were allayed by adapting the treaty to their understanding, by delineating the land they conveyed and the land they

reserved by great and commanding objects." *Northern Pacific Ry.* v. *United States*, 227 U.S. 355, 361 (1913). The territorial integrity of the Reservation was, moreover, protected by the already enacted Non-Intercourse Act, 25 U.S.C. 177 and the Indian Traders Act, 25 U.S.C. 261 *et seq.* In sum, as of 1855, the Yakima Reservation was confirmed as more "separate" than any State of the Union and subject to no outside authority except the limited supervision of the federal government.

The question, then, is whether anything occurring since 1859 when the Yakima Treaty was ratified has relevantly diminished the tribe's powers within its territory. Plainly, there has been no voluntary abandonment of tribal autonomy. As this Court recently noted, "[s]ince [1859], the Yakima Nation has without interruption maintained its tribal identity"; as late as 1953, it was one of the few tribes considered to have a " 'tribal law-and-order organization that functions in a reasonably satisfactory manner' "; and the Yakima Nation "has consistently contested the wisdom and the legality of attempts by the State to exercise jurisdiction over its Reservation lands." *Washington* v. *Yakima Indian Nation*, *supra*, slip op. 5, 12 n.19, 25-26 n.33. If tribal sovereignty has been diminished, it must be at the hands of the Congress.

2. Just before the turn of the century, two events of potential legal significance occurred. The first was the opening up of the Yakima Reservation, like many others, to non-Indians. In part, at least, this resulted from the allotment of substantial portions of the tribal lands to individual members pursuant to the General Allotment Act of February 8, 1887, ch. 119, 24 Stat. 388 (see *United States* v. *Sutton*, 215 U.S. 291, 292 (1909)), and the subsequent alienation of some of these tracts, together with some of the remaining "surplus lands" (see Act of December 21, 1904, ch. 22, 33 Stat. 595), into other hands. The result is that, today, some 20% of the Reservation acreage is held in fee, primarily by



non-Indians, and the permanent population includes more non-Indians than Indians. *Washington* v. *Yakima Indian Nation*, *supra*, slip op. 5-6. But, as this Court has firmly settled, neither the provisions of the Allotment Act, nor the fact of non-Indian ownership, removes such tracts from the boundaries of the Reservation or subjects them to State law. *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *United States* v. *Mazurie*, *supra*; *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Moe* v. *Salish & Kootenai Tribes*, *supra*.

We turn to the other occurrence, the admission of Washington as a State in 1889. Since even Indian Reservations created after statehood by Executive Order are generally exempted from State law (*e.g.*, *Donnelly* v. *United States*, 228 U.S. 243, 255-259, 268-272 (1913); *Arizona* v. *California*, 373 U.S. 546, 597-598 (1963)), it is plain the admission of a territory to statehood cannot change the status of a Reservation already "set apart" by solemn treaty. Here, however, we have an affirmative declaration by Congress that the separateness of existing Reservations in the new State shall be preserved, and that is a circumstance which this Court has stressed in justifying federal jurisdiction or applying the preemption doctrine. See, *e.g.*, *United States* v. *Sutton*, *supra*, 215 U.S. at 295; *United States* v. *Sandoval*, 231 U.S. 28, 36-38 (1913); *United States* v. *Chavez*, 290 U.S. 357, 360 (1933); *Williams* v. *United States*, 327 U.S. 711, 714-715 n.10 (1946); *Williams* v. *Lee*, *supra*, 358 U.S. at 222-223 & n.10; *Warren Trading Post* v. *Tax Comm'n*, *supra*, 380 U.S. at 687 n.3; *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, 411 U.S. at 178; *Fisher* v. *District Court*, *supra*, 424 U.S. at 386 & n.8.

In relevant part, the Enabling Act of February 22, 1889, ch. 180, 25 Stat. 676 (Wash. Br. 5a-6a), providing for the admission of Washington and three other states, required each of the new States to adopt at constitutional conventions "irrevocable ordinances" whereby

the people declared (Section 4 (Second), 25 Stat. 676–677):

> [T]hat they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; * * * that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation of said States so long and to such extent as such act of Congress may prescribe.

As required, identical provisions were made part of the Wash. Const. art. XXVI (J.S. App. 95).

Although Washington has at times argued otherwise, there remains no doubt that the effect of the Enabling Act is generally to preclude State jurisdiction, whether for criminal, civil or tax purposes, at least over trust and restricted lands within Indian Reservations. Identical provisions in the Arizona Enabling Act, ch. 130, 36 Stat. 569, and in this same statute as applied to Montana, have been so construed. *McClanahan*, *supra*, 411



U.S. at 178; *Fisher*, *supra*, 424 U.S. at 386 & n.8. And, most recently, the Court evidently indulged the same assumption with respect to the Reservation in suit. *Washington* v. *Yakima Indian Nation*, *supra*, slip op. 14–20.

To be sure, as the *Yakima* case holds, Section 6 of Pub. L. No. 280 (Wash. Br. 9a), when implemented by affirmative State legislation, effectively removed the bar of the Enabling Act to the State's assumption of jurisdiction to the extent there provided. Slip op. 14–29. But *Bryan* v. *Itasca County*, *supra*, makes clear that Public Law 280 did not intend to terminate tribal self-government and has no relevance to State taxing authority. See, also, *Yakima Indian Nation*, *supra*, slip op. 24–25 n.32. Indeed, here Washington apparently concedes that the application of Public Law 280 to the Yakima Reservation has no bearing on the question presented. The upshot is that the Washington Enabling Act remains in full force except with respect to the limited jurisdiction assumed under Pub. L. No. 280.

3. We turn, finally, to the substantial body of legislation that established an overriding federal policy of encouraging the tribes to regain a measure of political and economic independence, free of undue interference by outside authority.

*a*. As is familiar history, the first major step in that direction was the enactment in 1934 of the Indian Reorganization Act, ch. 576, 48 Stat. 984. Although the Yakima Nation—already having a functioning government—did not reorganize under that statute, its provisions remain important insofar as they define the bounds of tribal autonomy. Indeed, within a year, the Congress itself explicitly enacted that failure to reorganize under the Act should not prevent any tribe from enjoying the benefit of "[a]ll laws, general and special, and all treaty provisions affecting [its] reservation." Act of June 15, 1935, ch. 260, Section 4, 49 Stat. 378, 25 U.S.C. 478b. See, also, J.S. App. 33–34.

The Court has recently had occasion to review the history of the Indian Reorganization Act. *Mescalero Apache Tribe* v. *Jones*, *supra*, 411 U.S. at 151-152. See, also *Fisher* v. *District Court*, *supra*, 424 U.S. at 387, 390. In *Mescalero Apache Tribe*, it was ruled that the statute did not require exemption of an *off-reservation* tribal enterprise from State income taxes. But, at the same time, the Court noted the new congressional policy initiated by the Reorganization Act and, specifically, that "tribes were encouraged to revitalize their self-government" and to take control of their "business and economic affairs," while the territorial integrity of their Reservations was protected, *inter alia*, by "put[ting] a halt to the loss of tribal lands through allotment." 411 U. S. at 151. Each of these goals is of obvious relevance to our case.

We need add little to what was said in *Mescalero*. It is perhaps appropriate, however, to stress that the Indian Reorganization Act was more then a mere declaration of policy. Section 16, 25 U.S.C. 476, expressly authorized the adoption of constitutions vesting in the tribe or a tribal council "all powers" under "existing law," as well as certain additional prerogatives including authority "to negotiate with the Federal, State, and local Governments." The breadth of this provision is illustrated by the ruling in *Fisher*, where the Court held that Section 16 authorized a preemptive tribal ordinance governing adoption. 424 U.S. at 390. Nor are the powers embraced by Section 16 confined to members. In important respects, they are territorial. See *Powers of Indian Tribes*, 55 I.D.14 (1934), cited with approval in *United States* v. *Wheeler*, *supra*, 435 U.S. at 328. The express power to enter into intergovernmental "negotiations" is also suggestive: there is at least an implication that the tribes enjoy a degree of sovereignty over their own territory.

Other provisions of the Reorganization Act confirm this view. Restrictions on the alienation of allotments are extended indefinitely. Section 2, 25 U.S.C. 462.



Further allotment of Reservations is ended. Section 1, 25 U.S.C. 461. Surplus tribal lands may be withdrawn from sale or appropriation. Section 3, 25 U.S.C. 463. And the Secretary of the Interior is authorized to create new Reservations or to restore or add lands to existing Reservations. Sections 5 and 7, 25 U.S.C. 465 and 467. Plainly, this territorial emphasis reflects a Congressional determination to establish a "sheltered place," as well as an economic base, for the exercise of tribal autonomy.

Nor was economic development left to exhortation. Indian corporations were to be established at government expense (Sections 9 and 17, 25 U.S.C. 469 and 477) and substantial loans to them were authorized (Section 10, 25 U.S.C. 470). As this Court has noted, the intent was " 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism,' " and to provide the means for a tribe to engage in enterprises that would "generate substantial revenues for the education and * * * economic welfare of its people." *Mescalero Apache Tribe*, *supra*, 411 U.S. at 151, 152, in part quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934).

*b.* The policy of the Indian Reorganization Act became threatened two decades later when Congress reverted to an assimilationist approach, evidenced by Public Law 280 and several Termination Acts. See, generally, *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). But the Reorganization Act was never repealed and, since the mid-1960's it has been supplemented by other legislation in the same vein.

We may note the enactment in 1966 of 28 U.S.C. 1362, 80 Stat. 880, expressly recognizing the capacity of Indian tribes to initiate litigation in their own behalf in federal courts, free of at least some of the impediments that would bar individuals. See *Moe*, *supra*, 425 U.S. at 468-469 n.7, 472-475. In 1968 Congress strengthened the control of the tribes over their reservations by pro-

hibiting further State assumptions of jurisdiction except with tribal consent. 25 U.S.C. 1321-1326, 82 Stat. 78 (Wash. Br. 13a-16a). See *Kennerly* v. *District Court*, 400 U.S. 423 (1971). The same Indian Civil Rights Act, while imposing certain restrictions on their exercise for the protection of individuals, expressly recognized broad "powers of self-government" in Indian tribes. 25 U.S.C. 1301(2), 1302, 1311. Indeed, in *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 62, this Court found that one goal of the Act was "to promote the well-established federal 'policy of furthering Indian self-government,' " and, partly on that ground, concluded that the individual rights there guaranteed must normally be vindicated in tribal courts. See, also, *id.* at 63-64.

*c.* Even more recently, in the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450 *et seq.*, the Congress has confirmed its commitment to Indian self-determination, which includes the desire of "the Indian people * * * to control their relationships both among themselves and with non-Indian governments, organizations, and persons." 25 U.S.C. 450(a)(2). See *Bryan*, *supra*, 426 U.S. at 389 n.14. And, finally, there are a number of statutes which reflect a congressional decision to recognize Indian tribes as separate governmental units. *E.g.*, State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1227 (b)(4); Economic Opportunity Act of 1964, 42 U.S.C. 2790 (c) and (f); Solid Waste Disposal Act, 42 U.S.C. 6903(13); Housing and Urban Development Act of 1965, 42 U.S.C. 3106(b). See, also, Clean Air Act Amendments of 1977, Pub. L. No. 95-95, Section 164(c), and (e), 91 Stat 735, 42 U.S.C. 747(c) and (e); Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, Section 710, 91 Stat. 523, 30 U.S.C. 1300.

4. In rehearsing the provisions of federal law that bear on the present status of the Yakima Nation and its Reservation, we have attempted to obey the injunction



"to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." *McClanahan*, *supra*, 411 U.S. at 172. But, as we noted at the outset, the object of the exercise was not to identify specific language expressly barring the particular State intrusion challenged in this case. That is no more necessary here than it was in *Williams*, or *Warren Trading Post*, or *McClanahan*, or *Moe*, or *Bryan*. With respect to activities confined within an Indian Reservation, there is no presumption that the State may exercise its usual police powers. Compare *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). On the contrary, here exclusion of State law is the normal rule: "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in [our] history." *Rice* v. *Olson*, 324 U.S. 786, 789 (1945). And any outside supervision of Reservation affairs is generally reserved to federal power. Accordingly, the State is presumptively out of bounds and a finding that its action is preempted does not require a direct conflict with federal enactments. Cf. *Hines* v. *Davidowitz*, 312 U.S. 52, 68 (1941); *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504 (1956).

On this understanding, and read against the "backdrop" of the Indian sovereignty doctrine (*McClanahan*, *supra*, 411 U.S. at 172), the treaty and statutory provisions we have reviewed fully sustain the claim of preemption. Perhaps, as *Moe* suggests, they do not foreclose State taxation of sales to non-Indians when the tribal government is not significantly affected. But, in our view, it is impossible to read the Treaty with the Yakimas, the Washington Enabling Act, the Indian Reorganization Act, and the more recent statutes without concluding that the Congress has declared its intention to preempt interference with the *actual* exercise of Indian sovereignty of the kind involved here. Indeed, it would be imputing to Congress something of a cruel joke to read its legislation as en-

couraging this tribal experiment in self-help and, at the same time, to hold that it permits State action wholly defeating the enterprise. We prefer to assume a more serious congressional purpose. In our submission, the relevant provisions of treaty and statute announce an "overriding federal policy" which both authorizes tribes to undertake such activities within their Reservations and shields them against destructive State interference when they take up the invitation.

## CONCLUSION

For the foregoing reasons, the judgment of the district court in the *Yakima* case should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

JAMES W. MOORMAN
*Assistant Attorney General*

LOUIS F. CLAIBORNE
*Deputy Solicitor General*

EDWARD J. SHAWAKER
JAMES CLEAR
ANNE S. ALMY
*Attorneys*

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No. 78-630

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UNITED STATES

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UNITED STATES OF AMERICA,
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ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

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## BRIEF OF APPELLEE, YAKIMA NATION

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JAMES B. HOVIS
HOVIS, COCKRILL & ROY
*Counsel for Appellee, Yakima Nation*

Office and Post Office Address:
316 North Third Street
Yakima, Washington 98907
Telephone: (509) 575-1500

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JAMES B. HOVIS
HOVIS, COCKRILL & ROY
*Counsel for Appellee, Yakima Nation*

Office and Post Office Address:
316 North Third Street
Yakima, Washington 98907
Telephone: (509) 575-1500

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**No. 78-630**

**IN THE**

# SUPREME COURT

**OF THE**

UNITED STATES

OCTOBER TERM, 1978

STATE OF WASHINGTON, et al.,

*Appellants,*

vs.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION, et al.,

*Appellees.*

STATE OF WASHINGTON,

*Appellant,*

vs.

UNITED STATES OF AMERICA,
and
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

*Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

## BRIEF OF APPELLEE, YAKIMA NATION

### JURISDICTION

This appeal is not within the jurisdiction of this Court.

The Solicitor General submits that this Court does

not have jurisdiction under 28 USC 1253, because this case was not one required to be heard by a three-judge district court, and that consequently, this appeal is not within this Court's appellate jurisdiction. The Confederated Tribes and Bands of the Yakima Indian Nation, hereinafter called "Yakima Nation" joins in the Solicitor General's submission and believes that the cited cases *Swift and Company v. Wickham*, 382 U.S. 111, 129 (1965); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481 n. 17 (1976), *Phillips v. United States*, 312 U.S. 246, 252 (1941), are apposite.

A distinction has been clearly drawn by this Court between direct attacks on the constitutionality of a state statute and attacks on the constitutionality of the result obtained by the use of a state statute. *Phillips v. United States*, supra. This case falls within the later alternative. No state statute or order has been found or claimed to be unconstitutional. It is the *result* of the use of a state statute in matters involving Indian Commerce or transactions within Indian Reservations that form the basis of the Appellees contentions below. No attempt was made to declare state statutes unconstitutional. It was the *result* obtained by the use of a state statute on Indian commerce or transactions within an Indian Reservation that appellee's sought to restrain.[1]

[1] This Appellant admits. See Appellant's Opening Brief, p. 42-43.



The State of Washington has clearly recognized this distinction. After the District Court's preliminary injunction issued on September 6, 1974 and even after the final injunction issued on May 10, 1978, the state of Washington has continued to administer its tax laws without legislative response to the District Court's determination. This appears to your writer to be the controlling aspect of this case irregardless of whether this result obtained from the use of a state statute was prohibited by the Commerce Clause or the Supremacy Clause.

The District Court's determination was limited to tribes and tribal licensees operating under an overall tribal ordinance or law and did not have statewide application. The District Court's determination therefore did not call for a three judge District Court. See: *Board of Regents of the University of Texas System v. New Left Education Project*, 404 U.S. 541, 544 (1971).

The Yakima Nation did not seek to invoke 28 USC §2881.

## QUESTIONS PRESENTED

1. Whether a three-judge District Court was lawfully convened under 28 U.S.C. §2281 such that this Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1253.

2. Whether a state may impose upon an Indian

tribe and/or its licensed retailers the obligation to collect and remit state excise taxes on sales of personal property to non-members on trust lands where the state has no applicable criminal or civil jurisdiction over the Indian seller.

The three-judge District Court determined that the legal incidence of imposition of the tobacco excise tax is on the seller and that the legal incidence of the state cigarette and sales excise taxes are on the purchaser. The three-judge District Court has determined that the imposition of sales and cigarette excise taxes on the non-Indian purchaser of cigarettes is an interference with tribal self-government as it would be economically destructive of the tribal enterprises. No such determination was made as to the sales excise tax on sales of other personal property. The three-judge District Court found that the sales of cigarettes by tribally licensed Indian retailers has been pre-empted by tribal ordinance. These determinations by the District Court give rise to the following subordinate questions to (2) above:

a) Whether tribally regulated Indian retailers have an obligation to collect and remit state taxes on sales of personal property (cigarettes) to non-members when the sales transaction is already being regulated and taxed by an Indian tribe having reserved this sovereign power when the Secretary



of Interior has approved such regulation and taxation.

b) Whether the imposition of an obligation upon an Indian tribe and/or its licensed retailers to collect and remit state excise taxes on the tribally taxed sales of personal property to non-members thereby giving non-Indian retailers a price advantage and thereby severely effecting an established tribal enterprise, infringes on tribal self-government and is therefore prohibited.

c) Whether the determination of the legal incidence of the state cigarette and sales excise taxes by the District Court was correct.

d) Whether the determination that the legal incidence of a state excise tax falls upon a non-member purchaser for purchases on land where the state has no criminal or civil jurisdiction over the Indian seller gives authority to the state to impose an obligation on the Indian seller to collect state excise taxes.

3. Whether a state that cannot enforce or administer its taxing system without judicial intervention, may constitutionally impose on persons not subject to its jurisdiction the obligation to collect and remit state excise taxes on sales of personal property.

4. Whether a state may unilaterally impose record keeping and reporting requirements on an Indian tribe

and/or its licensed Indian retailers making sales of personal property on trust lands within an Indian Reservation when the state has no civil or criminal jurisdiction over the tribe or Indian seller.

5. Whether a state has the non-judicial power to seize property of a sovereign Indian tribe in the possession of a common carrier in interstate commerce destined for an Indian reservation where the Indian tribe sells cigarettes to its members in an admitted state tax free transaction because its members have in the past sold the majority of the cigarettes purchased in such a tax free sale to non-members in sales the state claims are taxable to the non-members.

6. Whether a state may, without congressional or judicial authorization constitutionally enter a building of an Indian seller located on trust land within an established Indian Reservation, to enforce collection of state taxes imposed upon a non-Indian purchaser for sales occurring on lands where the state has no criminal or civil jurisdiction, and seize or levy on goods in the possession of the Indian seller and owned by the Indian seller.

## SUMMARY OF ARGUMENT

The District Court's determination that a state may not impose upon an Indian Tribe and/or its licensed retailers the obligation to collect state excise taxes from non-member purchasers for sales on trust lands where



the state has no civil or criminal jurisdiction within an established Indian reservation over which the state has disclamed jurisdiction; rests comfortably on the "Worcester doctrine", *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, the "McClanahan principle", *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, and the "Williams test." *Williams v. Lee*, 358 U.S. 217.

Absent permission by Congress, prohibition of such state intrusion into transactions taking place where the state has no criminal jurisdiction over an Indian seller is absolute even if the state would have jurisdiction over transactions in which only non-Indians are involved. Such transactions are within the *exclusive* jurisdiction of Congress and the tribal government whose right of self-government was reserved by treaty.

Under the "Worcester doctrine", the "McClanahan principle", and the "Williams test", any state intrusion into Indian-non-Indian transactions affecting Indians in areas where the state has no criminal or civil jurisdiction over the Indian involved, is a prohibited interference with the right of reservation Indians to make their own laws and to be ruled by them. Affirmance of the District Court's determination on these principles will establish the constitutional distinction between unlawful state intrusion into an area where the state has no criminal jurisdiction and lawful state intrusion into an area where Congress has authorized

criminal jurisdiction over Indians. Cf. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463. Such an announcement would beneficially clarify standards regarding state-Indian relationships.

Even if state intrusion is not prohibited on the rationale of lack of jurisdiction over the Indians involved in the Indian-non-Indian transaction, the District Court's determination that Washington may impose upon an Indian tribe and/or its licensed retailers the obligation to collect state excise taxes from non-member purchasers rests comfortably on the "Williams test." The "Williams test" provides, absent governing Acts of Congress, that state action may not infringe on the rights of reservation Indians to make their own laws and be governed by them. In the instant case, the District Court has correctly determined that the Indian tribe had the power to tax and regulate the Indian-non-member transaction by tribal ordinance and that the "Williams test" pre-empted any state intrusion into the same transaction. Further, the District Court having determined that the imposition of an additional state tax on the sale would destroy the tribal enterprise, correctly determined that such impairment was prohibited by the "Williams test." These determinations are correct and are not in conflict with *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463. In *Moe*, there was no tribal enterprise; there was also



no tribal ordinance taxing and regulating the transaction. *Moe* had many other factual differences and does not control the instant case. In *Moe*, the state had criminal jurisdiction over the retailers. *Moe* should be limited in application to its facts.

Washington admits it does not have *judicial* power to seize cigarettes belonging to Yakima Indians in interstate commerce or from Indians as it lacks jurisdiction. However, Washington contends that it has non-judicial power to make such seizures.

Washington does not have the non-judicial power to seize property of a sovereign Indian tribe in the possession of a common carrier in interstate commerce destined for an established Indian reservation where the Indian tribe sells cigarettes to its members in an admitted state tax free transaction. Such a non-judicial seizure authorized by Washington statutes violates the Due Process Clause of the Fourteenth Amendment. The non-judicial determination of a state that a portion of the cigarettes previously sold to Indian retailers were resold to non-Indian purchasers in areas of the reservation over which Washington has no jurisdiction does not bring this non-judicial seizure within constitutional standards. *United States v. Mississippi Tax Commission*, 412 U.S. 363; *American Oil Co. v. Niell*, 380 U.S. 451.

Washington does not have the non-judicial power

under its statutes to enter into a building owned by an Indian on lands over which it has no civil or criminal jurisdiction for the purpose of seizing and selling property belonging to said Indian to enforce collection of state excise taxes previously imposed upon a non-Indian purchaser. Such a seizure is clearly prohibited by the Due Process Clause of the Fourteenth Amendment as it is a seizure in violation of the Fourth Amendment.

Washington's non-judicial tax collection scheme for the collection of taxes imposed on a non-Indian purchaser from Indians in areas without Washington's jurisdiction does not meet constitutional standards. As Washington's non-judicial collection scheme is unconstitutional and Washington admits it may not use state judicial power to collect these taxes; there is no obligation for the Indian seller to collect and remit the taxes imposed on a non-Indian purchaser. The absence of a constitutional non-judicial power of collection disposes of Washington's contention that there is an obligation on the Indians to collect and remit the tax. *McClanahan v. Arizona Tax Commission,* 411 U.S. 164, 178-79.

Washington may not impose its reporting and auditing requirements on persons over which it has no criminal and civil jurisdiction or constitutional powers of non-judicial collection. Washington has no criminal or civil jurisdiction over the Yakima Nation. The



Yakima Nation has common law immunity from suit. Washington does not have any applicable criminal or civil jurisdiction over Yakima Indians for transactions on trust lands within the Yakima Reservation. *Washington v. Yakima Indian Nation,* 58 L. Ed.2d 740. Washington cannot impose its reporting and auditing requirements on the Yakima Nation or its licensed retailers.

The District Court's determination that the legal incidence of the tobacco tax was on the Indian seller is correct. This Court should determine that the legal incidence of the other state excise taxes are also on the Indian seller. It is admitted that where the legal incidence of the state excise tax is on the Indian, that Washington may not collect its state excise taxes.

## ARGUMENT

### 1. Under "Worcester Doctrine" and "McClanahan Principle", Washington's taxation scheme does not apply to sales by tribal Indians on trust lands within the Yakima Indian Reservation.

A discussion of the issues raised by Washington's appeal requires consideration of some basic concepts.

The District Court's determination rests comfortably on a conception of Indian tribes as self-governing Indian communities which retain inherent powers of self-government. The basic contours of this conception of Indian tribes as "domestic dependent nations" under the "protection" of the United States were first estab-

lished by Chief Justice Marshall writing for the Court in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-17 (1830). Chief Justice Marshall more fully developed this concept in *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515, 559-562 (1832): "The Indian Nations have always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil. The very term 'nation' so generally applied to them means 'a people distinct from others.' The Constitution by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian Nations, and consequently admits their rank among those powers who are capable of making treaties . . . The whole intercourse between the United States and this Nation, is, by our constitution and laws, vested in the government of the United States."

At the time of European contact, Indian tribes and their governments were functioning as independent nations and were viewed and dealt with as such by European powers. They were recognized as having authority of their own (more commonly referred to as sovereignty) to manage their affairs within their territory *and with other nations*. Though Chief Justice Marshall's opinions are often considered to be the cornerstone of Indian sovereignty, these opinions had a limit-



ing effect on the inherent powers of an Indian tribe. However, these limitations were on the *external* powers of Indian tribes to deal with other nations and did not effect tribal powers within Indian reservations. Chief Justice Marshall stated that the Constitution "confers on Congress the powers of war and peace; of making treaties, and of regulating commerce . . . with the Indian tribes." "These powers," Justice Marshall said, "*comprehend all that is required* for the regulation of our intercourse with the Indians . . ."[2]

This was the law of the land at the time the Confederated Tribes and Bands of the Yakima Nation treated with the United States. The resulting *Treaty with the Yakimas*[3] clearly stated that the signatory fourteen tribes and bands "for the purposes of this treaty, are to be considered as one nation." Examination of the minutes of the treaty council shows that the executed treaty *explicitly* guaranteed that the Yakima Indians were to have "their own government" and were to have "their own laws." See: Treaty Minutes

[2] Emphasis supplied. *Worcester v. Georgia*, 31 U.S. (6 Pet. 515, 559 (1832).

Also see: *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867) regarding state power to tax tribal Indians:

> "If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas governed exclusively by the government of the Union. If under the control of Congress, *from necessity, there can be no divided authority.*" (Emphasis supplied).

[3] Executed on June 9, 1855. 12 Stat. 951, 2 Kappler 524.

accompanying *Treaty with the Yakimas*, filed in Docket 77-388.

Further, Article II, *Treaty with the Yakimas*[4] provided that the Yakima Indian Reservation was to be set apart for the exclusive use and benefit of the Yakimas and that no one except United States government personnel was to enter this reserved area without the permission of the Yakima Nation. This Court has explained the effect of this article: "*Implicit* in these treaty terms, . . . was the understanding that the internal affairs of the Indians remained *exclusively* within the jurisdiction of whatever tribal government exists.[5]

In 1978, Justice Stewart speaking for the Court, restated this concept of Indian tribes as self-governing political communities which retain inherent powers of sovereignty. *United States v. Wheeler*, 435 U.S. 313, 323 (1978): "In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

Washington agrees that the Yakima Indian Nation "is a soverign Indian Nation and Tribe established by treaty with the United States (12 Stat. 951) with a governing body duly recognized by the Secretary of the

[4] 12 Stat. 951, 2 Kappler 525. Appellant's Brief, App. 5a.

[5] First emphasis is this Courts. Second emphasis is your writers. *Williams v. Lee*, 358 U.S. 217, 221.



Interior of the United States of America."[6]

Washington agrees that the transactions involved are within the exterior boundaries of the Yakima Indian Reservation and the sales to non-members of the Yakima Nation takes place on allotted land held in trust by the United States.[7] Washington was admitted to the Union in 1889. The Enabling Act (Ch. 180, Laws of 1889, 25 Stat. 696) providing for the admission of the State of Washington (among other states) to the union, provided in Section 4 that Indian lands in the state of Washington, and therefore the Yakima Indian Reservation, should "remain under the absolute jurisdiction and control of the Congress of the United States, . . ." (Appellant's Brief App. 5a). Under this explicit mandate of the congressional Enabling Act, the people of Washington, through constitutional convention, incorporated this disclaimer of jurisdiction and control over Indian lands into Article XXVI of the Washington State Constitution in acceptance and in recognition of the *exclusive* federal nature of transactions within Indian Reservations located in the newly created State of Washington.

From the general concept of Indian tribes as self-governing Indian communities subject only to the *exclusive* control of Congress, this Court has evolved a

[6]. Pre-trial Order, hereafter "PTO", 5.2, A. 171.

[7] PTO 5.7, 5.8, A. 172-176.

principle regarding state taxation on Indian Reservations. Justice Brennan speaking for the Court has designated this principle: "The McClanahan principle."[8] This principle provides that state tax laws are not applicable to tribal Indians on an Indian Reservation except where Congress has *expressly* provided that State laws shall apply.[9] The foundation of this principle is the "plenary and *exclusive* power of the federal government to deal with Indian tribes . . . , and 'to regulate and protect the Indians and their property against *interference* even by a state. "[10]

When non-Indians are involved in reservation situations, this Court uses what Justice Thurgood Marshall speaking for the Court has designated the "Williams test."[11] This "test" was stated by Justice Black for this Court in *Williams v. Lee*, 358 U.S. 217 (1959). *Williams v. Lee*, held that state courts have no jurisdiction to hear a civil action brought by a non-Indian against a tribal Indian arising from a transaction on a reservation. The stated "test" was:

> "Essentially, absent governing Act of Congress, the question has always been whether the state action infringed on the rights of reservation Indians to make their own laws and to be ruled by them."[12]

[8] *Bryan v. Itasca County*, 426 U.S. 373, 376 n. 1 (1976).

[9] Id. Emphasis supplied.

[10] Id. Emphasis supplied.

[11] *McClanahan v. Arizona Tax Commission*, 441 U.S. 164, 179 (1973).

[12] Id.



For an understanding of the "test", the Court asks us to compare *Utah v. Northern R. Co. v. Fisher*, 116 U.S. 28 (1855). *Utah v. Northern R. Co. v. Fisher* involves an action brought by a non-Indian corporation which owned sixty-nine miles of railroad. A quarter mile of this railroad ran through the area designated by treaty as the Fort Hall Reservation. The non-Indian owner sought relief from territorial tax for this quarter mile of railroad. No Indian or tribal interests were involved and the right of way for this quarter of a mile had been ceded by the Indians to the United States. Also, this railroad had been constructed in this federal territory pursuant to an Act of Congress. The Court determined that even if the railroad were within the Fort Hall Reservation that there would be no relief for the non-Indian plaintiff as no "rights of the Indians *can* be impaired." (Emphasis added).

Justice Black for the *Williams v. Lee* Court further calls to our attention the principle that Congress has "acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," and clearly indicates that the Court believed that the extent of state intrusion into the affairs of reservation Indians is a matter for Congress alone.[13]

In view of this direction by the Court, it is appropriate that we examine the present policy of Congress re-

[13] *Williams v. Lee*, 358 U.S. 217, 221.

garding tribal self-government. This Court has noted the present focus of Congress towards "strengthening tribal self-government." *Bryan v. Itasca County*, 426 U.S. 373, 388 n. 14 (1976) and the possible destruction of tribal self-government "if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory power, including taxation, of state and local governments." *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976).

This Court has also described the "Williams test" as prohibiting the exercise of the state's interest: (1) Where "the tribal self-government would be *affected.*" *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 179 (1973) (Emphasis supplied). (2) Where the burden "frustrates" tribal self-government, *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463, 483 (1976). Justice Black's phrasing of the "Williams test" has also been repeated in *Fisher v. District Court*, 424 U.S. 382, 386-87 (1976) (per curiam) (dictum); *Kennerly v. District Court*, 400 U.S. 423, 426-27 (1971) (per curiam) (dictum); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 179 (1972) (dictum).

We will hereafter discuss why the District Court's determinations are sustained by application of the "Williams test."[14] However, an initial inquiry into the necessity for such a discussion is appropriate. Applica-

[14] This brief pp.



tion of the "Williams test" is not necessary to uphold the District Court's judgment and restraint.

It is clear that in executing and ratifying the *Treaty with the Yakimas*, the United States and the Yakima Nation understood that the Yakima Reservation should be under *exclusive* tribal control. Subsequently, the state of Washington was created from a portion of Washington Territory and the already established Yakima Reservation was within the exterior boundaries of the newly created state. It was one of the requirements for admission to the Union and the people of the newly formed state expressly agreed, that the Yakima Reservation should be *exclusively* within the control of Congress.

The State of Washington is pre-empted by the Enabling Act (Ch. 180, Laws of 1889, 25 Stat. 696) from taxing transactions on Indian lands in the State of Washington in which Indians are in any way involved until Congress gives its permission. We believe that it would follow that *all* transactions are preempted by the "absolute control of Congress" were it

not for the "McBratney rule" involving transactions totally between non-Indians.[15]

If we return to the opinion in *William v. Lee*, we will see that the Court clearly intended that Congress should determine the area of state intrusion into Indian reservations if Indians were in any way involved. (358 U.S. at 221). Actions of Congress subsequent to *Williams v. Lee* manifest continued adherence by this Nation to the core of *Worcester v. Georgia*, 31 U.S. (6 Pet) 515 (1832). (Menominee Restoration Act of December 22, 1973, 87 Stat. 770; Indian Self-Determination and Education Assistance Act of January 4, 1974, 88 Stat. 2203. Indian Civil Rights Act of April 11, 1968, 82 Stat. 77, Indian Financing Act of 1974, 88 Stat. 77.) We further note that *Williams v. Lee* was announced in 1959 during a period in which state intrusion would probably have met with tacit Congressional approval. This Court has indicated that the federal courts should not be strained to implement this policy which Congress has now rejected. *Bryan v. Itasca County*, 425 U.S. 373, 389 n. 14.

[15] *United States v. McBratney*, 104 U.S. 621 (1882). The justification for this state extra-territorial jurisdiction over a non-Indian defendant (with a non-Indian victim) is often curiously stated. See: *Draper v. United States*, 164 U.S. 240 (1896) and *New York ex rel Ray v. Martin*, 326 U.S. 496 (1946). The "McBratney rule" is hard to harmonize with *Worcester v. Georgia, supra; United States v. Antelope*, 430 U.S. 641 (1977) and *Kennerly v. District Court*, 400 U.S. 423 (1971).

*United States v. Mazurie*, 419 U.S. 544 (1975) forecloses the application of the "McBratney rule" to *matters regarding commerce on Indian Reservations.*



This Court has by its decisions subsequent to *Williams v. Lee*, manifested continued adherence to the core of *Worcester v. Georgia* and the plenary power of Congress: *Washington v. Yakima Indian Nation*, ..... U.S. ....., 58 L.Ed. 2d 740 (1979) (plenary power of Congress to determine reservation jurisdiction); *United States v. Wheeler*, 435 U.S. 313 (1978) (inherent tribal sovereignty), *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977) (tribal sovereign immunity), *Delaware Business Council v. Weeks*, 430 U.S. 73 (1977) (plenary power of Congress); *Rosebud Sioux v. Kneip*, 430 U.S. 584 (1977) (plenary power of Congress to determine reservations); *United States v. Antelope*, 430 U.S. 641 (1977) (plenary power of Congress to determine jurisdiction); *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (Supremacy Clause forbids state taxation of Indians); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976) (plenary power of Congress to determine distribution from Indian lands); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (plenary power of Congress to determine area of state jurisdiction on reservations); *United States v. Mazurie*, 419 U.S. 544 (1975) (plenary power of Congress to regulate commerce on Indian reservations among non-Indians and to delegate authority to tribes); *Morton v. Mancari*, 417 U.S. 435 (1974) (Congressional Indian employ-

ment preference permissible to improve tribal self-government); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (plenary power of Congress to determine validity of transfer of Indian lands to state); *Morton v. Ruiz*, 415 U.S. 199 (1974) (Fiduciary responsibility of federal government to Indians); *Fisher v. District Court*, 424 U.S. 482 (1976) (preemption of tribal ordinances over state courts regarding adoptions of reservation Indians); *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) (plenary power of Congress to determine jurisdiction for adjudication of reservation water rights); *Antoine v. Washington*, 420 U.S. 194 (1975) (Congressional ratification of an agreement with an Indian Tribe binding on states); *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (plenary power of Congress to determine area of reservation and relations therein); *United States v. Mason*, 412 U.S. 391 (1973) (federal fiduciary responsibility to Indians); *Mattz v. Arnett*, 412 U.S. 481 (1973) (plenary power of Congress to determine reservation); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) ("McClanahan principle"); *Mescalareo Apache Tribe v. Jones*, 411 U.S. 145 (1973) ("McClanahan principle" limited to reservations); *United States v. Jim*, 409 U.S. 80 (1972) (plenary power of Congress to determine distribution of income from Indian lands); *Kennerly v.*



*District Court*, 400 U.S. 423 (1971) (plenary power of Congress to control State-Indian relations); *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (plenary power of Congress to abrogate treaty rights not to be lightly imputed to Congress); *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965) (federal regulation pre-empts state taxation of a non-Indian reservation trader); *Seymour v. Superintendent*, 368 U.S. 351 (1962) (power of Congress to determine extent of and jurisdiction on Indian reservations); *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1959) (plenary power of Congress over Indian lands).

*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) is saved from the above listing for separate discussion. In discussing this case we must note this Court's reliance on a concurring opinion in *Fletcher v. Peck*, 10 US (6 Cranch) 87, 147 (1810). Some discussion of the majority opinion in *Fletcher v. Peck* is in order. *Fletcher v. Peck* grew out of a famous scandal in Georgia politics: The Georgia legislators attempted to cancel the original land grants on the ground that the original Georgia legislators who had made the grants had been bribed. The land Georgia originally conveyed to defendant Peck's predecessor in interest was (at the time of the conveyance) held and occupied by several Indian tribes. (10 U.S. (6 Cranch) at 88, 142-43).

Plaintiff Fletcher argued that a 1763 proclamation by the King of England had confirmed full title to the subject lands in these tribes, thereby rendering Georgia incapable of transferring any interest in it. (Id. at 102, 117, 141-42). The Court held for the defendant on this issue (Id. at 142). However, that ruling did not determine the legal rights of Indians in land acquired after the American Revolution by the United States from Indians. Chief Justice John Marshall for the Court clearly indicated that the legal effect of this pre-revolutionary acquisition was "compromised" and that this "compromise is not now to be disturbed." (Id. at 142). Even regarding pre-revolutionary acquisitions, Marshall's opinion for the Court enunciated a compromise position: "The majority . . . is of opinion that the nature of the Indian title which is certainly to be respected by all courts, until it is legitimately extinguished, is not such as to be absolutely repugnant to seisen in fee on the part of the state." (Id. at 142-43). This compromise determination set the course of Marshall's later opinions more fully treating issues arising from United States-Indian relations. These later opinions have been considered the foundation of the "Worcester doctrine" that we have discussed and this doctrine forms the basis of United States-Indian relations regarding treaties executed after the formation of the



Union and in particular the *Treaty with the Yakimas.*[16]

However, before we leave *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), we note that the Court held that the contract clause of the Constitution prevented Georgia from annulling land titles that had previously vested in good faith purchasers from the state's original grantees. We consider that an important holding that should be discussed. We believe this holding is apposite.

To show applicability, an initial inquiry must be directed to the existence of a contract in the instant case. No one denies that the State of Washington at the time of its admission to the Union expressly disclaimed jurisdiction over the Yakima Indian Reservation leaving affairs within this reservation under the "absolute jurisdiction and control of the Congress of the United States." Nor can it be denied that these promises were obtained by the United States in fulfillment of its fiduciary duty for the benefit of the Yakima Nation and its members. All elements of a contract are present. (17 Am. Jur 2d, *Contracts* §10).

We do not dispute that these promises may be more than a contract. In *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1941), the Court so determined:

"In carrying out its treaty promises with the Indian

[16] *Cherokee v. Georgia*, 30 U.S. (5 Pet.) 1 (1830) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) were the law of the land at the time of the execution of the *Treaty with the Yakimas.*

tribes, the government is more than a contracting party."

Similarly, this Court has held the United States to the most exacting fiduciary standards in carrying out its treaty promises and imposes on the United States the obligation to act at all times with the Indians' best interests uppermost in mind. *Seminole Nation v. United States, supra; Chippewa Indians v. United States*, 301 U.S. 358, 375-76 (1937). The fact that the duty of the United States is higher than a contracting party, should not foreclose the United States from being considered a contracting party. The greater duty would logically include the lesser duty. While Congress possessing plenary power can direct a change, the State of Washington is forbidden by the Contract Clause from impairing this promise made for the benefit of the Yakima Indians. *Fletcher v. Peck, supra,* and *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812) support this conclusion.

We return to this Court's opinion in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). *Oliphant* determined that the Suquamish Indian Tribe, by submitting to the overriding sovereignty of the United States, gave up their power to try non-Indians in their Courts, *except in a manner acceptable to Congress.* We contend that Washington by agreeing that "Indian lands shall remain under the absolute jurisdiction and con-



trol of Congress" at the time of its admission, gave up their power to legislate regarding transactions on said Indian lands, *except in a manner acceptable to Congress. Oliphant* supports this contention.

An *explicit* Congressional grant of power to the state should be required to substantiate any state involvement on the Yakima Reservation. *Oliphant* recognizes Indian sovereignty "not *withdrawn* by treaty or statute, or by implication as a necessary result of their dependent status." *Oliphant* recognizes that Indian sovereignty over both their members and their territory was *reserved* by treaty. The tribal power is *reserved* by treaty and an explicit grant of power is not required.[17] On the other hand, any power of the state of Washington within the Yakima Reservation must be *granted* by Congress. No inherent power of the State of Washington was *reserved* as regards Indians or their territory at the time of Washington's admission to the Union. Washington could not reserve what it did not have. Its sovereign powers as a state were created by its admission to the Union and by the government of that Union. Further, as a condition to that admission, the people inhabiting the proposed state agreed that "Indian lands shall remain under the abso-

[17] *United States v. Winans*, 198 U.S. 371, 381 (1905) not only points out that treaty rights were *reserved* not *granted* rights but that these reserved rights survive the admission of a state (at 382). Likewise, it shows that rights of the state are granted rights (at 383).

lute control of Congress." Until Congress grants Washington power over Indians and their territory, none exists.

Unless this Court would adopt a "heads the state wins — tails, the Indians lose" principle, the lack of explicit federal grant of state power to Washington should determine this case on the other side of the *Oliphant* determination.

Congress has not only failed to grant the State of Washington any power to regulate or tax transactions between Indians and non-Indians on the Yakima Reservation, but Congress has further shown its intent that state taxing laws should not apply. In *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 691 n. 18 (1965), the Court determined that the intention of Congress in passing and the Interior Department in interpreting the Buck Act[18] is that state power to levy sales or use taxes does not apply to Indian reservations. This case involved a non-Indian taxpayer. The Court however based its holding on the *additional* ground of federal pre-emption by reason of federal

[18] The Buck Act, codified by Act of July 30, 1947 (61 Stat. 641) 4 USC §§105-110. The Buck Act was originally passed by the Senate on September 30, 1940 and by the House on October 1, 1940. As the Supreme Court of Idaho points out in *Mahoney v. State Tax Commission*, 96 Idaho 59, 524 P.2d 187, 192-93 (1974), Congress must have known of the May 1940 (57 I.D. 129, 140-141) opinion of the Solicitor of the Interior Department ruling against a state tax on the selling of tobacco products by Indians on the Menominee Reservation to "the general public" when Congress excepted Indians from state excise taxation in federal areas. (4 USC §109). See also: *Valandra v. Videt*, S.D. 259 N.W. 2d (1977).



regulation pursuant to the Indian Traders Act.

We submit that under the foregoing reasoning and authority, that the State of Washington has no power to tax transactions involving tribal Indians on trust land within the Yakima Reservation. We further submit that this determination can be made without the *additional* ground of violation of the "Williams test" by reason of state taxes being destructive of tribal enterprise and pre-emption of the area by tribal ordinance.[19] Such a determination is within the jurisdiction

[19] The Yakima case is an appeal involving *jurisdiction* not *taxation* and the "McClanahan principle", not the "Williams test". We derive this distinction from this Court's instructions in *Tonasket v. Washington*, 411 U.S. 951 (1973) (per curiam) vacating a judgment of the Washington Supreme Court in *Tonasket v. State*, 79 Wash. 2d 607, 488 P. 2d 281 (1971), herein called "Tonasket I." In vacating the Washington judgment, obligating an Indian retailer to collect the Washington cigarette tax for the on-reservation sale of cigarettes to non-Indians, this Court ordered the Supreme Court to reconsider its decision in light of "§§6 and 7 of C. 157, 1972 Extraordinary Session Laws of the State of Washington and this court's decision in *McClanahan v. Arizona Tax Commission*" decided twenty-eight days previously by this Court. On remand, the Washington State Supreme Court held that §§6 and 7 of C. 157, 1972 Extraordinary Session Laws of the State of Washington exempt Indian retailers from the obligation to collect state cigarette excise tax on his sales to non-Indians and that he was authorized to possess unstamped cigarettes. Application of the McClanahan principle was therefore not required to sustain the Indian retailers non-taxability. *Tonasket v. State*, 84 Wn. 2d 164 (1974) herein called "Tonasket II."

In *Tonasket II*, the Colville tribe was described as a tribe that had petitioned for *full* jurisdiction under Section 5, Chapter 36, 1963 Washington Laws (R.C.W. 37.12.021). Appeal of *Tonasket II* to this Court was denied for lack of federal question. 420 U.S. 915. The Yakima jurisdiction status is different from the Colville tribe. The Yakima Nation has not petitioned for state jurisdiction and Washington has no civil or criminal jurisdiction over the transactions involved in this appeal. *Washington v. Yakima Nation*, 58 L. Ed. 2d 740, 753 N. 18.

If the state had jurisdiction then the "Williams test" would apply. Until then, the "McClanahan principle" should control. See excellent discussion in *Mahoney v. State Tax Commission*, 96 Idaho 59, 524 P. 2d 187 (1974).

of this Court and the scope of this review. *Dandridge v. Williams*, 397 U.S. 477 (1970).

**2. District Court's determination supported by "Williams Test". *Moe v. Confederated Salish and Kootenai Tribes* not controlling.**

The preference of your writer to hold to the "Worcester doctrine" and the "McClanahan principle", until Congress explicitly and specifically speaks in state-Indian relationships, is based on the desire for manageable standards in these matters. The Yakima Nation's commitment to the "McClanahan principle" is based on the desire to clearly sustain their right of self-government without having to show economic loss or gain. Profit is really not the point in my client's eyes. The powers of self-government within the exterior boundaries of the Yakima Reservation have been reserved and have not been modified by Congress. Washington's claim that the Yakima Nation is merely marketing a tax advantage, when they regulate their own retailers by their own laws, is most offensive. With large cigarette excise taxes, Washington could make this claim against every other sovereign in the United States, particularly Oregon. Industries and trade are attracted thru tax advantages by our Nation's separate sovereigns every day. Washington itself advertises for industry based on the attraction of low ad valorem taxes and lack of income tax, but we do not suggest



that this has any effect on their sovereignty. That this statement about marketing a tax advantage is made and that Washington believes that this rhetoric will be effective before this Court, speaks volumes. The principles of reserved self-government — not rhetoric — should determine this appeal.

However, this Court may prefer to determine this appeal under the judicial "Williams test." If so, we suggest that the District Court's determination that a state's intrusion may be limited by tribal pre-emption has considerable merit. Tribal pre-emption, as determined by the District Court, is limited to areas where a tribe has retained inherent tribal powers.

At the very beginning of this discussion, your writer wishes to make it clear that the Yakima Indian nation does not propose any tribal pre-emption of state application of any of its laws outside of the exterior boundaries of the Yakima Indian Reservation. In this case we specifically defer to the state taxation of any personal property in the possession of non-Indians *outside* of the exterior boundaries of the Yakima Indian Reservation. The fact that the sale is non-taxable where it is made does not impair state taxation for the use or possession of the property by the user in non-reservation areas of the state of Washington. Just as Washington taxes the use of goods brought from Oregon or other states outside their jurisdiction by resi-

dents of non-reservation areas, so does the State have power to tax the use by these same residents outside the Yakima Reservation. It is where the State reaches into areas where it has no jurisdiction to impress the collection of the tax on those not within its jurisdiction, that the law of this land prohibits such state intrusion.

It may be easier and politically more attractive for Washington to impose its unilateral will on a discrete and insular, politically impotent minority, than to enforce its laws by seizure and penalty directed towards members of a dominant politically active group. However, we suggest that this should not effect this Court's decision. If Indians not subject to state jurisdiction are to be made tax collectors to assist the State in its political tax collection problems, we suggest that Congress—rather than this Court—should make this decision. Indeed, the Court in *Williams v. Lee*, 358 U.S. 217, 223 (1958) has suggested that this is the state's only solution. We suggest that there is another, i.e., a state-tribal negotiated reservation wide joint taxing and sharing system. Tribal efforts in this regard have been rejected and are not a part of this determination.

As later discussed, the Yakima Nation has the clear power to tax transactions of non-Indians within the exterior boundaries of the Yakima Indian Nation. The Yakima Nation, as a policy matter, has limited this sovereign power to basic transactions between Indians and



non-Indians, such as the tribal tax on sales of cigarettes and tobacco to non-Indians and taxes on the lease of Indian land. The Yakima Nation fully realizes that governmental entities must receive income to provide services and has therefore severely limited the exercise of its sovereign power of taxation to transactions involving Indian retailers. Both sales to Indians and non-Indians are taxed. However, this policy determination should not be interpreted as a lack of power to tax all transactions within the reservation unless prohibited by an authorized Act of Congress.

The Yakima Nation has a governmental function within the exterior boundaries of the Yakima Reservation and must have income to provide basic governmental services to both Indians and non-Indians. This governmental duty and burden is a substantial one and requires the expenditure of millions of dollars of tribal funds. In the main, the cost of these governmental services to Indians and non-Indians is supported directly by funds derived from tribal operations such as its cigarette enterprise. Where the Yakima Nation establishes a business off the Yakima Reservation, such as its aircraft enterprise, it pays all taxes to the State of Washington. This is true even though the funds used to pay taxes would assist tribal self-government. The converse, however, is not true. When the State of Washington runs a business such as its state liquor stores on

the reservation, it makes no provision for any of the income to flow to the Yakima Nation. This is true in spite of the obvious burden the sale of liquor places on the sovereign law and order function of the Yakima Nation.

Let us now discuss the sovereign power of the Yakima Nation to tax Indians and non-Indians on the Yakima Reservation. The Yakima Nation was federally established by *Treaty With the Yakimas* (12 Stat. 951). In Article II of the *Treaty With the Yakimas*, the Yakima Reservation was reserved for the *exclusive* use of the Yakima Nation and no one was to reside thereon without the permission of the Yakima Nation. This sovereign right to exclude non-members is still retained. The Yakima Nation and its governing bodies are recognized by the United States of America. An important attribute of that sovereignty is the power to levy taxes on both tribal members and non-tribal members.

Felix S. Cohen in *Handbook of Federal Indian Law*, (1942) has written:

> "One of the powers essential to the maintenance of any government is the power to levy taxes. This power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress is a proposition which has never been successfully disputed." (F. S. Cohen, *Handbook of Indian Law* (1942) citing *Buster v. Wright*, 135 F. (8th Cir. 1905), Appeal dismissed 203 U.S. 599; and *Morris v. Hitchcock*, 194 U.S. 384, (1904).



That is to say, the tribal power to levy taxes does not find its source in the sovereign power of the United States, and is derived from the inherent sovereignty of the Indian tribe. Also, the Yakima Nation as previously discussed, was promised the right to be governed by its own laws. Tax laws are a part of such laws.

Thus, in *Maxey v. Wright* (3 Ind.T. 243, 54 S.W. 807, affirmed 105 F. 1003) decided in 1900, the Court of Appeals of Indian Territory held that under the Creek Indian Treaty of 1856, guaranteeing the Creeks the right of self-government and the power to exclude non-members, a non-Indian attorney was required to pay an annual occupation tax of twenty-five dollars levied by the Creek Nation.

The principles identified in these early cases were discussed by the Eighth Circuit Court of Appeals in *Iron Crow v. Oglala Sioux Tribe of the Pine Ridge Reservation*, 231 F. 2d 89 (8th Cir. 1956). Attention is invited to the Court of Appeal's reasoning. In *Iron Crow*, the plaintiff, an enrolled member of the Oglala Sioux Tribe and possessing allotted trust lands on the Pine Ridge Reservation, leased to non-members of the tribe, sought to enjoin the tribe from levying a tax against his *non-member* lessee for the privilege of grazing stock upon land located within the reservation. After finding inherent tribal sovereignty, the *Iron Crow* Court then addressed the question of whether this

Indian tribe had power and authority to levy taxes on *non-Indian* citizens of the United States and the State of South Dakota, (pages 98-99):

> "A similar question was presented to this court in *Buster v. Wright*, 8 Cir. 1905, 135 F. 947, appeal dismissed 203 U.S. 599, 27 S. Ct., 777, 51 L. Ed. 334. That case involved the validity of a permit tax on the Creek Nation for the privilege which it offered to those who were not citizens of its nation or trading within its borders. In upholding the right of the Creek Nation to enforce the tax, Judge Walter H. Sanborn, speaking for the court, said, 134 F. at page 950:
>
> 'The authority of the Creek Nation to prescribe the terms upon which non-citizens may transact business within its borders did not have its origin in act of Congress, treaty or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensible to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.
>
> 'Originally an independent tribe, the superior power of the republic early reduced this Indian people to a 'domestic, dependent nation' *(Cherokee Nation v. State of Georgia*, 5 Pet. 1-20, 8 L.Ed. 25), yet left it a distinct political entity, clothed with ample authority to govern its inhabitants and to manage its domestic affairs through officers of its own selection, who under a Constitution modeled after that of the United States, exercised legislative, executive, and judicial functions within its territorial jurisdiction for more than half a century.'
>
> "We approve of the statement in Cohen's *Handbook of Federal Indian Law*, page 142, as follows:



> 'One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withtdrawn or limited by treaty or by act of Congress is a proposition which has never been successfully disputed.' (Citing *Buster v. Wright, supra*, and *Morris v. Hitchcock*, 1903, 21 App. D.C. 565 affirmed 194 U.S. 384, 24 S. Ct., 712, 48 L. Ed., 1030).
>
> "Inasmuch as it has never been taken from it, the defendant Oglala Sioux Tribe possesses the power of taxation which is an inherent incident of its sovereignty. The tribe has seen fit to give orderly implementation to that power through the adoption of a constitution which, among other things, has specifically provided for the levy of taxes. Such action was taken in accordance with the provisions of the Indian Reorganization Act, 1934, 48 Stat. 987, 25 U.S.C.A. §476."
>
> "We conclude from the original precept of tribal sovereignty and the fact that the power of the Oglala Sioux Tribe to impose the tax or license in question has not been pretermitted by any federal statute or agency ruling thereunder, but to the contrary, has been implemented by the Indian Reorganization Act, supra, that such power still exists."

See also the reasoning in *Barta v. Oglala Sioux Tribe*, 259 F.2d 553. (Eighth Circuit 1958). *Idaho State Tax Commission v. Mahoney*, 524 P. 2d 187 (Idaho, 1974), and 55 I.D. at pp. 46-48.

The reasoning in these cases supports the power of the Yakima Nation to tax sales to non-Indians by the Yakima Nation's licensees operating on Indian trust lands within the exterior boundaries of the Yakima Indian Nation.

Since *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) deals with state taxation of sales of cigarettes by Indians to non-Indians, it is appropriate that we discuss the difference between the facts in *Moe* and the instant case. A table would appear to be the best way to illustrate the differences:

| **Elements in Moe** | **Elements on Yakima Reservation** |
|---|---|
| State scheme required pre-collection of tax at time of sale by distributor (presumably non-Indian, off-reservation). 425 U.S. 145 at 467 n 6. | State scheme requires collection only upon sale to non-Indian on trust land, on reservation. Imposes duty to place stamps on retailer. A. 214. |
| State scheme required registration for fee which court held improper. Id. at 480. | State scheme requires registration without fee and extensive record keeping and verification of sales that are not taxable to members or within state power. A. 214, 217. |
| State's enforcement limited to criminal prosecution of seller for selling unstamped cigarettes. Id. at 482. | State claims entire civil and criminal enforcement powers as provided in state statutes. A. 195. |
| No finding that cigarettes are distributed by tribal distributor and purchased by retailers with income to tribe. Id. | Cigarettes purchased from tribal enterprise bringing employment and income to tribe. A. 177. |
| No finding of tribal regulation of cigarette sales. | Extensive tribal regulation providing for |



| **Elements in Moe** | **Elements on Yakima Reservation** |
|---|---|
| The cigarettes are sold by private business ventures who lease land from tribe and pay a small administrative fee but there is no tribal regulation or income based on volume. Id. | location, total employment of tribal members and pricing. A. 201-211. |
| No showing of tribal tax. Id. | Tribal tax. For six years tribe has taxed all retail sales by licensed retailers and from fees and mark-up generates approximately $225,000 a year for tribal purposes. A. 177. |
| The State had criminal jurisdiction over retailers. Id. 467. | The State has no applicable civil or criminal jurisdiction over tribe, or retailers on trust property on reservation where sales are made. *Washington v. Yakima Nation, supra.* |
| No showing of tribal benefit from sales. Id. | Tribal benefit in employment of members, income from mark-up, and tax income above set forth. A. 177-182. |
| There was no dispute that tax on non-Indians was lawful. Parties agreed to this. Id. at 483. | Tribe disputes that there is any tax due from non-Indians until they are at a situs where the states power may attach. No state power at sales situs where state attempts to impose tax. A. 190-194. |

| Elements in Moe | Elements on Yakima Reservation |
|---|---|
| *First incidence of tax on distributor who had duty to* place stamps. Direct tax on consumer. Retailer had duty to pre-collect tax. Id. at 482. | First incidence on any possession, etc., and on retailer to collect at time of sale. A. 215. See discussion this Brief, *infra.* |
| No finding that tax would hurt retailers. Id. | Determination that tax will destroy retailers and severely limit tribal income and employment. J. S. App. 35. |
| State had scheme of enforcement that did not entail seizure of Indian property on reservation. Id. at 482. | State scheme entails unconstitutional seizure on reservation. Discussion this Brief, *infra.* |
| No showing that tribe promised to be able to live under own laws. Id. | Treaty promises that Yakimas would live under own laws and would be free from outside interference. This Brief *supra.* |

We believe that a comparison of the above factors will show the *Moe*, supra, is supportive of the Yakima Nation's position.

We would next like to discuss the problem of double taxation and the tribe's pre-emption even if the State had power to tax the transaction between Indian and non-Indian. The Yakima Nation is already taxing each sale of cigarettes by its licensees in the amount of two and one-half cents per pack. This is true regardless of whether the purchaser is Indian or non-Indian.



As discussed above, this power clearly exists in the Yakima Nation. The Yakima Nation was established by treaty as a distinct independent political community on a reservation reserved for its exclusive use with the power to tax transactions on its reservation. The supremacy principle will control a conflict between state law and a treaty right. The supremacy principle applies to state taxation. *Scandinavian Airlines System, Inc. v .County of Los Angeles*, 56 Cal. 2d., 11, 363, P.2d 25. Cert denied. 368 U.S. 899. Based on this supremacy principle, the Yakima Nation's sovereign right to tax these transactions between Indian and non-Indian on trust property within its reservation where the State has no jurisdiction, must prevail.

In summary, this appeal does not concern itself with the taxation of transactions among non-Indians, or transactions outside the reservation, or even transactions with non-Indians on non-trust lands within the reservation. What this appeal does involve is the impression of the obligation on tribal Indians to collect and remit state taxes levied on non-Indian — Indian on-reservation transactions on lands not within Washington's jurisdiction. The impression of this obligation will in the uncontested determination of the District Court destroy both the tribal regulatory scheme and the tribal enterprise. It is noted that the ordinance and the tribal enterprise have been approved by the applic-

able federal authority. It would be hard to find a better set of circumstances that calls for the restraint of state action under the "Williams test". *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463, should be limited to its facts. This is an appropriate place for the words of Justice Holmes:

> "The power to tax is not the power to destroy while this Court sits." (227 U.S. at 223).

**3. Washington may neither seize cigarettes destined for the Yakima Nation in interstate commerce as contraband or seize personal property on trust lands outside Washington's jurisdiction. This lack of state power of judicial administration or constitutional non-judicial administration disposes of the case.**

As part of the "McClanahan principle" this Court has announced in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 178-79 (1973) that:

> "Unless the State is willing to defend the position that it may constitutionally administer its tax system without judicial intervention, . . . the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case."

Washington does not have criminal or civil jurisdiction over the Yakima Nation or its members for the concerned transactions on trust or restricted lands. *Washington v. Yakima Indian Nation*, ..... U.S. ....., 58 L.Ed. 740 (1979). It is admitted that the retailers are all enrolled members of the Yakima Nation and that these retailers transact business on allotted land held in trust by the United States for individual Indians



or by restricted deed to individual Indians. (Appellant's Brief, p. 16).

Washington contends that it may constitutionally administer its tax system *without* judicial intervention.[20] While Washington agrees that it may not lawfully assess a tax against the Yakima Nation derived from its wholesale distribution of cigarettes to its licensed members and cannot therefore attempt to collect these taxes by its past method of summary distraint procedure (Appellant's Brief, p. 18 n. 8), Washington contends that it may seize and sell unstamped cigarettes being delivered to the Yakima Nation in interstate commerce without any judicial proceedings or even an administrative warrant. The basis for this summary action is a unilateral ex parte administrative determination that a portion of these cigarettes — admittedly lawfully sold as exempt from cigarette or other state excise taxes to tribal members — may or will be resold to non-Indian purchasers on trust lands in the Yakima Indian Reservation by tribal retailers. Washington

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[20] Appellant's Brief p. 103. Washington recognizes that it has no jurisdiction over the Yakima Nation or its members. Even if it had jurisdiction over the Yakima Nation, the Yakima Nation is immune from legal action. *Puyallup Tribe v. Washington Game Department*, 443 U.S. 165, 172-173 (1977); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *North Sea Products v. Clipper Seafoods*, 92 Wn. 2d 236, . . . P. 2d . . ., (1979).

Technically, the enforcement issue is not in controversy as the District Court held that there was no taxes due. The District Court's restraint prohibiting Washington from seizing or confiscating cigarettes belonging to the Yakima Nation or its members was based on that determination. However, the enforcement issue has relevancy as to whether the tax is due as we herein discuss and the question of jurisdiction is not raised by this appellee.

contends that this procedure meets the requirements of the Due Process Clause of the Fourteenth Amendment. The State's position is untenable.[21] The State claims that it can lawfully require stamps to be affixed to cigarettes prior to shipment to the Yakima Nation and if stamps are not affixed, those cigarettes are subject to being seized as contraband. By maintaining that position, Washington substantiates our contention — that the first legal incidence of the tax falls upon the Yakima Nation or its licensed retailers. However, the state recognizes that if the first legal incidence of the tax is on the Yakima Nation or its licensed retailers, it is invalid under *McClanahan*. Washington attempts to avoid such a result by asserting that the first legal incidence of the tax falls on the non-Indian purchaser of the cigarettes and that the tax is not due until the sale is made to the non-Indian purchaser. If this assertion is assumed to be correct, then it is clear that no tax has become due while the cigarettes are in transit. To seize unstamped cigarettes before any tax is due and owing would be a clear violation of the Due Process Clause of the Fourteenth Amendment. Therefore, it is clear that regardless of whom is to bear the first legal incidence of the tax, the Yakima Tribe or its licensed retailers, or the non-Indian purchaser, Washington cannot seize unstamped cigarettes being shipped to or by the Yakima

[21] The State's enforcement scheme is without "process" let alone "due process."



Nation without violating the Due Process Clause of the Fourteenth Amendment and without impermissibly interfering with interstate commerce. Contrary to Washington's statement[22] we most certainly do claim that the procedures used by the State in seizing and selling unstamped cigarettes violates the Due Process Clause of the Fourteenth Amendment. While the State may burden an interstate shipment by regulations requiring adequate information to determine where the cigarettes are going, the cases are clear that under the Commerce Clause and the Due Process Clause, that the state may not use its regulatory or police powers to seize or sell cigarettes where the consignee is located in an area where the state does not have jurisdiction. In the following cases, state courts have held that where the unstamped cigarettes were in transit to areas where the state lacked jurisdiction, they were not subject to tax by the state and further, were not subject to penalties, forfeitures, seizure or other regulatory powers even though the cigarettes were unstamped. *Pfeiffler v. State*, 226 Ark. 825, 295 S.W. 2d 365 (1956); *Neeld v. Giroux*, 224 N. J. 224, 131 A. 2d 508 (1957); *State v. 483 Cases*, 98 N.H. 180, 96 A. 2d 568 (1953).

The state cases cited by Washington are inapposite.[23] In each of those cases the cigarettes were destined to areas where the state had jurisdiction and the cigar-

[22] Appellant's Brief p. 104.

[23] Appellant's Brief p. 105.

ettes were to become part of the state's goods. *State v. Sedacca*, 252 Md. 207, 249 A.2d 456 (1969); *Angelica Co. v. Goodman*, 52 Misc. 2d 844, 276 N.Y. Supp. 2d 766 (1966); *People v. Asta*, 337 Mich. 590, 60 N.W. 2d 472 (1953); *Commonwealth v. Flickinger*, 165 Pa. Super. 95, 67 A.2d 779 (1949) *aff'd* 364 Pa. 59, 73 A.2d 652 (1950), *cert. denied* 340 U.S. 843 (1950); *People v. Locriccho*, 342 Mich. 210, 69 N.W. 2d 723 (1955).

Likewise, Washington incorrectly cites *Organized Village of Kake v. Egan*, 339 U.S. 60 (1962) as authority for the proposition that Indian reservations are within the territorial jurisdiction of the state in which they are located. This is clearly incorrect. See: *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965); *Williams v. Lee*, 358 U.S. 217 (1959); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973). *Organized Village of Kake v. Egan, supra*, was clearly distinguished by the Court within the corners of the Court's opinion. Organized Village of Kake, did not have a reservation or treaty. This Court pointed out the difference between the *Kake* situation and a situation where a recognized reservation had been established. After citing the case of *Metletakla Indian Community v .Egan*, 369 U.S. 45, 62 (1961), the Court said:

> "The situation here differs from that of the Metletakla Indian Community in that neither Kake or Angoon has been provided with a reservation . . ."



Further, we would argue that the Washington cited cases of *Morrow v. Henneferd*, 182 Wn. 625, 47 P.2d 1016 (1935), *Rainier National Park Co. v. Martin*, 18 F. Supp. 581, on rehearing 23 F. Supp. 60 (W.D. Wash. (1937), affirmed 302 U.S. 661 (1938), and *Sherman-Reynolds, Inc. v. Mahin*, 47 Ill. 2d 323, 265 N.E. 2d 640 (1970), stand for the proposition that state power to require sellers to collect excise taxes from purchasers is based on state police or regulatory power and not upon the power to tax. The Supreme Court of Washington clearly says that in *Morrow*, at page 633:

> "Power to require collection rests on power of regulation."

In *Sherman-Reynolds*, the Supreme Court of Illinois similarly said at page 642:

> "[T]he legislative authority to enact Article 7, rests, not with its power to tax as intimated by defendants, but on the police power."

These cases support our position, not Washington's. It is agreed by everyone that the state does not have the power to tax the Yakima Nation or its members on the reservation. Likewise, since there is no power to tax the Yakima Nation or Yakima Indians as regards transactions that take place on trust property, the State has no police power or regulatory power or jurisdiction over transactions that take place upon that property.[24] As a general rule, a requirement that a

[24] Both the power to tax and the power to regulate should exist together to satisfy constitutional standards. In the instant case, Washington does not have jurisdiction to sustain either the power to regulate or the power to tax tribal Indians.

seller of goods collect a sales or use tax from a purchaser, where it is clear that the taxing state has power over both purchaser and seller and the transaction involved, there is no violation of due process. However, the other side of the proposition is just as well established. *Miller Brothers Co. v. Maryland*, 347 U.S. 340, rehearing denied 347 U.S. 964 (1954).

In *Miller*, the Supreme Court clearly held that the Due Process Clause of the 14th Amendment requires some definite link and connection between a state and the person, property or transaction that it seeks to regulate and the state's power is limited to areas within its jurisdiction. No such connection or jurisdiction existed in *Miller* and such a connection is non-existent in the present case.

*Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) is likewise distinguished. Since the state had jurisdiction over criminal offenses over the area involved in *Moe*, the state had power to arrest Indian retailers who violated the state criminal statute prohibiting the sale of non-stamped cigarettes. Accordingly, the Supreme Court held that an injunction prohibiting the arrest of Indian retailers would not lie. That is all *Moe* has said and it is clearly distinguishable from the present case because Washington has no criminal or civil jurisdiction over the Indian person, property or transaction it seeks to regulate.



Because *Rainier National Park v. Martin*, 18 F. Supp. 481, on rehearing 23 Fed. Supp. (W.D. WWash. 1937), affirmed 302 U.S. 661 (1968), involved a federal area in our state, it might be well to point out that the material facts therein are different from those in the present case. In *Rainier*, the state expressly *reserved* the right to tax and to collect and enforce the tax in the conveyance to the United States. In the instant case, Washington could not *reserve* any such rights insomuch as it was not a state when the Yakima Reservation was reserved. There was no grant to Washington, and Washington absolutely waived jurisdiction over the Yakima Reservation when it became a state.

Washington's cited case of *Carter v. Commonwealth of Virginia*, 321 U.S. 131 (1944) is likewise inapposite. This case does lead us to cases that are apposite. Before discussing these cases, it would be appropriate to point out that we are not discussing the rule of this Court that the federal and state governments may resort to summary procedures to minimize a taxpayer's opportunity to waste assets in anticipation of a collection attempt. *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 598 (1931). First, there is admittedly no tax due from the Yakima Nation, consignee of the transported cigarettes. Secondly, R.C.W. 82.24.130 directs itself to the seizure of goods unilaterally deemed "contraband" by the terms of the state statute and has no

direct relation to the collection of revenue.[25] Thirdly, the sales by the Yakima Nation to tribal members are admittedly non-taxable and Washington statutes provide no exceptions for such lawful non-taxable sales from the imposition of its contraband statute and clearly violate the Due Process Clause of the Fourteenth Amendment.

With those preliminary remarks, we now discuss this Court's rulings that we consider controlling. Seizure or taxation of liquor, generally prohibited or taxed by a state within its borders, is not constitutionally permitted where the liquor is consigned to a consignee federally authorized to possess and sell said liquor within an exclusive federal area. *United States v. Mississippi Tax Commission*, 412 U.S. 363 (1973); *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383 (1944). See also: *Hostetler v. Idewild Liquor Corp.*, 377 U.S. 324 (1964); *Heublein v. South Carolina Tax Commission*, 409 U.S. 275 (1972). This rule applies even if the liquor sold in the federal area is consumed outside of the federal area. *United States v. Mississippi*, supra.

Furthermore, the seizure is contrary to the Due Process Clause of the Fourteenth Amendment. *American Oil Co. v. Neill*, 380 U.S. 451 (1965). In *American*

[25] As long as Indian organizations are recognized as tribes by the United States, Congress is the one to determine what articles of "commerce" are "contraband." *Perrin v. United States*, 232 U.S. 478 (1914); *Tinker v. Midland*, 231 U.S. 681 (1914); *Dick v. United States*, 208 U.S. 340 (1908); *United States v. Laiviere*, 98 U.S. 188 (1876).



*Oil Co. v. Neill*, plaintiff, a licensed Idaho gasoline dealer, sold gasoline under a contract executed outside of the State of Idaho. He delivered the gasoline from a point outside of Idaho to the purchaser in Idaho by means of a common carrier. The purchaser thereafter used the gasoline in Idaho. Idaho statutes provided that a tax of six cents per gallon was due from the plaintiff dealer in such circumstances. The Court, speaking through Chief Justice Warren held that the purported imposition of the tax on the plaintiff was a violation of the Due Process Clause of the Fourteenth Amendment. That the gasoline imported was clearly intended to be used in the State of Idaho and the seller was a licensed Idaho dealer, was held to be insufficient considerations to uphold the tax.

Washington further contends that it may enter the Yakima Indian Reservation, go onto trust lands where they have no jurisdiction, enter buildings owned by the tribal retailers and seize unstamped cigarettes and sell them as contraband. All of this without judicial authorization. This contention is so far from the guarantees of exclusion from the Yakima Reservation contained in the *Treaty with the Yakimas* and the guarantees against illegal search and seizure contained in the Fourteenth Amendment, that it is predictable that no authority can be found in this regard. The Fourth Amendment binds the State of Washington under the

Due Process Clause of the Fourteenth Amendment. *Moss v. Ohio*, 367 U.S. 643 (1961).

Washington's further contention that it may criminally prosecute tribal retailers for a state defined crime on a portion of the Yakima Reservation where they have no criminal jurisdiction is likewise not sustained. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), does not sustain Washington's contention. In *Moe*, Montana had criminal jurisdiction over the retailers and this sustained Montanas only remedy, i.e. arrest of sellers not collecting the tax. Here Washington has no criminal jurisdiction that would sustain such an arrest. *Washington v. Yakima Indian Nation*, ....., U.S. ....., 58 L. Ed. 2d 740 (1979).

Failing to sustain Washington's power to constitutionally administer its tax system without judicial intervention, the system of administration is void against the Yakima Indians.[26] Further, the failure to sustain constitutional administration, will likewise dispose of the applicability of Washington's taxes. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 178-79 (1973).

[26] Lack of jurisdiction over the Yakima Nation and its members in the operation of their businesses, and the sovereign immunity of the Yakima Nation, should clearly dispose of *any* state reporting and auditing requirements.



**4. Legal incidence of state taxing scheme falls on tribal Indians.**

The Yakima Nation does not agree with the District Court's determination that legal incidence of the State of Washington excise taxes falls on a non-tribal purchaser.

Under the District Court's determination, the question of legal incidence of the tax under Washington's cigarette taxing scheme was immaterial as the District Court held the cigarette taxing scheme had been preempted by tribal ordinance and constituted an unreasonable interference with tribal self-government. It is agreed that if the legal incidence of a tax is on the Indian or a tribe, the "McClanahan principle" would make the tax void, and it would not be necessary to consider the District Court's determination of the applicability of the "Williams test" and tribal pre-emption. A discussion of the question of whether a legal incidence of the various tax excise taxes fall on the tribe or tribal Indian is therefore appropriate.

The legal incidence of the state cigarette taxing scheme does fall on the Indian or Indian tribe. The determination of where the legal incidence falls is a federal question.[27] Washington imposes a cigarette excise tax on the amount of $1.60 per carton. The tax is im-

[27] "The duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954).

posed pursuant to RCW 82.24.020 upon the "sale, use, consumption, handling, possession or distribution" of cigarettes. The tax is collected by means of tax stamps affixed to individual packages of cigarettes. Retailers are required to either purchase pre-stamped cigarettes from wholesalers or purchase a supply of stamps from the State which are to be affixed to the cigarettes by the retailer *prior to sale.*[28] R.C.W. 82.24.020 provides that it is the intent and purpose of the state's cigarette taxing scheme to "collect the tax from the person who first sells, uses, consumes, handles, possesses, . . . or distributes them in the state." R.C.W. 82.24.080 further declares the intent and purpose of the state cigarette taxing scheme to first impose the tax "at the time and place of the first taxable event occurring in" the State of Washington. There is no tax on the "purchase" of cigarettes. The plain words of the statutes impose the tax on the seller rather than the purchaser. While this Court has the duty to decide the legal incidence of the tax,[29] it is noteworthy that the Washington Supreme Court has determined that the legal incidence of the cigarette tax falls upon the first person who brings cigarettes into the State and sells, uses, consumes or distributes them. *Canteen Service, Inc. v. State*, 83 Wn. 2d 761, 522 P.2d 847 (1974). The State

[28] This description in the state cigarette taxing scheme is taken from Appellant's Brief p. 17. The emphasis is supplied.

[29] See note 27.



candidly admits that in all other situations rather than sale by Indians and non-Indians alike that the first incidence of the tax falls on the retailer or distributor. However, the State and the District Court rely on *Tonasket v. State*, 84 Wn.2d 164, 525 P. 2d 744 (1974) and the later adopted Department of Revenue Rule 192 and Excise Tax Bulletin 504.80.192. *Tonasket* would settle the question if the question of legal incidence in this case rested with the state. It does not. It is for the federal courts to determine the legal incidence of the tax from the plain reading of the statute. *First Agricultural Bank v. Tax Commission*, 392 U.S. 339, 347 (1968); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954). The plain reading of the statute shows that the legal incidence of the cigarette tax is on the *first* person who brings the cigarettes into the state and sells, uses, consumes or distributes them. Washington's actions show this to be their interpretation. They argue for first incidence on the purchaser to establish an exception from the "McClanahan principle," but then contend that they have the right to seize as contraband cigarettes destined to a distributor for these retailers prior to a sale to non-Indian purchasers. An inconsistent position. They cannot sustain their contention in both areas. While the state may not bind this court as to the interpretation of the language of the statute, state determination as to the necessary pro-

cedure regarding enactment of law and regulation is controlling. *Washington v. Yakima Indian Nation,* ..... U.S. ....., 58 L.Ed 2d 740, 763 n. 39 (1979). Department of Revenue Rule 192 and Excise Tax Bulletin 504.80.192 cannot amend or modify the statutes in question. The Washington Supreme Court has determined that statutes cannot be amended or modified by administrative rule or bulletin. *Pierce County v. State,* 66 Wn.2d 728, 731, 404 P.2d 1002 (1965); *Pringle v. State,* 77 Wn.2d 569, 464 P.2d 425, 573 (1970).

Under applicable law announced by this Court, such facts require a determination that the legal incidence is on the seller. *Polar Ice Cream and Creamery Co. v. Andrews,* 375 U.S. 361 (1964).

Likewise, the combined state-local[30] sales tax of plus five percent is imposed on the sale of tangible personal property and services at retail pursuant to R.C.W. 82.02.020. While the Department of Revenue by the promulgation of Administrative Regulation Rule 192 (WAC 458-20-192) on November 12, 1976 and publication of Excise Tax Bulletin 504-08-192 on November 24, 1976 purport to make certain exceptions for sales to tribal Indians, R.C.W. 82.32.020 still provides for a sales tax on all sales of tangible personal property and retail services in the State of Washington. R.C.W. 82.-

[30] Appellant's Brief p. 19. Certainly a misnomer. Local tribal governments with their governmental duties get no funds from this tax.



08.050 imposes the legal incidence of that excise tax on the seller in every sales transaction where payment is not made to the Department of Revenue. This personal liability of the seller results regardless of whether the non-payment is willful or beyond the sellers control. The facts of this case are that payment has not been made. The legal incidence of the tax is on the seller.

Finding the incidence of Washington's taxation scheme on the Indian, the "McClanahan principle" would exclude application of Washington's taxation scheme to Yakima retailers without reliance on the "Williams test" or tribal pre-emption.

## CONCLUSION

From the reasoning and authority contained herein, we would submit that this is an appeal involving *jurisdiction* not *taxation* and the "McClanahan principle" not the "Williams test." It is this lack of jurisdiction over the Yakima Nation and its licensed retailers, that should determine that Washington's excise taxing, collection and reporting scheme can have no effect on these same Indians.

As an *additional* ground, Washington's excise taxing, collection and reporting scheme fails to meet the "Williams test" as determined by the District Court.

We would therefore conclude that this Court determine that Washington's excise taxing, reporting and collection scheme is void as it effects the Yakima Nation and its licensed retailers, and affirm the judgment and restraints imposed by the District Court below.

DATED: July 3, 1979.

Respectfully submitted,

JAMES B. HOVIS
HOVIS, COCKRILL & ROY
*Counsel for Appellee,*
*Yakima Nation*

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1978

No. 78-630

STATE OF WASHINGTON, et. al.,
*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,
*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

# BRIEF OF APPELLEE INDIAN TRIBES

Of Counsel:
Robert L. Pirtle
Alvin J. Ziontz

Office Address:
600 - 1st Avenue
Pioneer Building
Seattle, WA 98104
Telephone: (206) 623-1255

STEVEN S. ANDERSON
ZIONTZ, PIRTLE, MORISSET ERNSTOFF & CHESTNUT
*Counsel for Appellee Indian Tribes*

CRAFTSMAN PRESS SEATTLE, WASHINGTON

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*Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) ..... 88, 89, 124

*Mescalero Apache Tribe v. O'Chesky*, 439 F. Supp. 1063 (D.N.M. 1977) ..... 23, 61



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*Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) ..... 13, 18, 30, 50, 60, *et. seq.*

*Morris v. Hitchcock*, 194 U.S. 384 (1904) .... 12, 21, 22, 33

*Morton v. Mancari*, 417 U.S. 535 (1974) ..... 92

*Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967) ..... 99

*National League of Cities v. Usery*, 426 U.S. 883 (1976) ..... 64, 65

*Nelson v. Sears, Roebuck and Co.*, 312 U.S. 359 (1941) ..... 111

*Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976) ..... 103

*Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972) ..... 100

*Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959) ..... 111

*Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) ..... 12, 19, 21, 23, 26, *et. seq.*

*O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973) ..... 23

*P. Lorillard Co. v. Seattle*, 83 Wn.2d 586, 521 P.2d 208 (1974) ..... 121

*Pennsylvania v. Nelson*, 350 U.S. 497 (1956) ..... 100

*Prigmore v. Renfro*, 356 F. Supp. 426 (N.D.Ala. 1972), *aff'd*, 410 U.S. 919 (1973)..... 4

*Query v. United States*, 316 U.S. 486 (1942) ..... 3

*Rice v .Olson*, 324 U.S. 786 (1945) ..... 67, 102

*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) ..... 100

*San Diego Building Trade Council v. Garmon*, 359 U.S. 236 (1959) ..... 101

*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) .....13, 25, 27, 32, *et. seq.*

*Schantz v. White Lightning*, 502 F.2d 67 (8th Cir. 1974) ..... 23

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*Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951) ..... 108

*Southern Ry. v. Greene*, 216 U.S. 400 (1910) ..... 123

*Standard Oil v. Peck*, 342 U.S. 382 (1952) ..... 112

*State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, ___ U.S. ___, 58 L.Ed.2d 740 (1979) ..... 3-4

*Swift and Co. v. Wickham*, 382 U.S. 111 (1965) ..... 3

*Talton v. Mayes*, 163 U.S. 376 (1896) ..... 37

*The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867) ..... 86

*Thomas v. Gay*, 169 U.S. 264 (1898) ..... 54

*Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744 (1974) .....9, 119, 122

*United States v. Brady*, 579 F.2d 1121 (9th Cir. 1978) .. 34

*United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188 (1876) .....66-67

*United States v. Holliday*, 70 U.S. (3 Wall) 407 (1865) 67

*United States v. Mazurie*, 419 U.S. 544 (1975) ..33, 41, 66, 92

*United States v. Mississippi Tax Commission*, 421 U.S. 599 (1975) ..... 120

*United States ex rel. Rollingson v. Blackfeet Tribal Court*, 244 F. Supp. 474 (D. Mont. 1965) ..... 23

*United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506 (1940) ..... 124

*United States v. Wheeler*, 435 U.S. 313 (1978) .....19, 24, 42, 47

*United States v. Winans*, 198 U.S. 371 (1905) ..... 47

*Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965) .....17, 22, 38, 116, 117, *et. seq.*

*Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, ___ U.S. ___, 58 L. Ed. 2d 740 (1979), ___ U.S. ___ 38 L. Ed. 2d 758.....43, 103

*Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) ..... 112



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*Williams v. Lee*, 358 U.S. 217 (1959) .....12, 13, 15, 19, 33, *et. seq.*

*Wilson v. Turtle Mountain Band of Chippewa Indians*, 459 F. Supp. 366 (D.N.D. 1978) ..... 23

*Winters v. United States*, 207 U.S. 564 (1908) ..... 97

*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).....15, 38, 40, 46, 53, *et. seq.*

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Constitution of The Confederated Tribes of The Colville Reservation, art. V, §1(e) (April 19, 1938)..... 25

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U.S. Const. art. VI, §1(f) ..... 25

U.S. Const. art. VI §1(g) ..... 25

**Statutes**

Excise Tax Bulletin 504.08.192.....9, 118

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P.L. 95-575, 92 Stat. 2463 ..... 94

RCW 37.12 ..... 3

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| 41 Stat. 445, 30 U.S.C. §1300 | 30 |
| 48 Stat. 94 | 30 |
| 49 Stat. 378, 25 U.S.C. §478(b) | 93 |
| 70 Stat. 626 (1956), Public Law 84-772 | 48 |
| 75 Stat. 45 (1961), Public Law 87-24 | 48 |
| 75 Stat. 639 (1961), Public Law 87-298 | 48 |
| 79 Stat. 552, 42 U.S.C. §3121, *et. seq* | 96 |
| 80 Stat. 880 (1966), 28 U.S.C. §1362 | 29 |
| 82 Stat. 69 (1968), Public Law 90-278 | 48 |
| 88 Stat. 77, 25 U.S.C. §1451, *et. seq.* | 95, 96 |
| 88 Stat. 2203, 25 U.S.C. §450 | 28, 94 |
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| 30 U.S.C. §1291(9) | 30 |
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| 42 U.S.C. §3161(a)(3) | 96 |
| 42 U.S.C. §6903(13) | 29 |
| WAC 458-20-192 | 9 |


**Other Authority**


| | |
|---|---|
| *A New Canon of Construction*, 12 San. L. Rev. 208 (1959) | 90 |
| Able, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L.Rev. 432 (1941) | 83, 115 |
| Admin. News 7026 (95th Cong. 2d Sess.) | 95 |
| *A Framework for Preemption Analysis*, 88 Yale Law Journal 363 (1968) | 101 |
| *1 American State Papers; Indian Affairs*, 16 (1832) | 72 |

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Barsch, *Issues in Federal, State and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique*, 54 Wash. L. Rev. 531 (1979) ..... 23

Felix Cohen, Handbook of Federal Indian Law 142 ..... 45

143 (1941 ed.) ..... 45, 83

Felix Cohen, Handbook of Federal Indian Law 439 (1966 Ed.) ..... 25, 91

Collins, *Implied Limitation on the Territorial Jurisdiction of Indian Tribes*, 54 Wash. L.Rev. 479 (1979) .... 23

*Documents Relating to the Colonial History of The State of New York*, 889 (O'Callahan ed. 1885) .. 70, 71, 80

*Documents Relating to the Constitutional History of Canada*, 1759-1791 (Short & Doughty, eds. 1907) .... 70

J. Due, *State and Local Sales Taxation*, 249 (1971) ..... 113

Everett Herald, May 12, 1979, 8-A ..... 25

Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40 L. and Contemp. Prob. 166 (1976) ..... 23, 25, 26

Handbook of Federal Indian Law, 142, 143 (1941 ed.) .. 45

Hearings Before the House Comm. on Indian Affairs on H.R. 7902 (73rd Cong. 2d Sess.) ..... 97

Hearings Before the Committee on Indian Affairs, United States Senate on S. 2755 and S. 3645 (73rd Cong. 2d Sess. 269) (1934) ..... 26, 97

H. Conf. Rept. No. 74-1778 (12B U.S. Code Cong.) .... 95

H.R. 474, 23rd Cong. 1st Sess. (1834) ..... 91

H.R. 6925 §19, 89th Cong. 1st Sess. (1965) ..... 48

30 J. Cont. Cong. 372-74 ..... 74

32 J. Cont. Cong. 365-69 ..... 74

33 J. Cont. Cong. 454 ..... 75

34 J. Cont. Cong. 182-83 ..... 74

J. Madison, *Journal of the Fed. Convention*, 47 (E. H. Scott Ed. 1894) ..... 78

70 Mich. L.Rev. 955 (1972) ..... 93





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W. Mohr, *Federal Indian Relations*, 1774 (1933) ..... 72

7 Op. Atty. Gen. 174 (1855) ..... 23

17 Op. Atty. Gen. 134 (1881) ..... 24

*8 Papers of James Madison*, 156 (1973) ..... 73

F. Prucha, *American Indian Policy in the Formative Years*, Ch. 1 (1962) ..... 70, 71

J. Smith, *Appeals to the Privy Council From the American Plantations*, 442 (1950) ..... 71

*Solicitor's Opinion, Powers of Indian Tribes*, 55 I.D. 14 (1934) ..... 45

S. 1413 §18, 89 Cong. 1st Sess. (1965) ..... 48

Task Force 7, Report on Reservation and Resource Development and Protection, Final Report to the American Indian Policy Review Commission, 87, *et. seq.* (1976) ..... 95, 96

Toward Economic Development for Native American Communities, Joint Committee Print, Joint Economic Committee (91st Cong. 1st Sess.) Vol. 2, Part II (1969) ..... 96

*The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U. Pa. L. Rev. 491 (1975) ..... 23

*The Federalist*

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No. 42 ..... 80

*The Legal Relationship Between the Washington State and its Reservation Based Indian Tribes*, State Office of Program Research (August 31, 1978) ..... 57, 58

Washington State's Office of Program Research, Report to The State House of Representatives (Aug. 31, 1978) ..... 57

C. Wright Law of Federal Courts §50 p. 191 (1970) .... 4

IN THE

# Supreme Court of the United States

**October Term, 1978**

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STATE OF WASHINGTON, et. al.,
*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,
*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

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# BRIEF OF APPELLEE INDIAN TRIBES

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## JURISDICTION

The United States has moved that *Washington v. United States and Yakima Tribe,* No. 3909, be dismissed for lack of three judge court jurisdiction, but has indicated that it does not challenge the jurisdiction in the instant case, No. 3868 below, involving Appellees Makah Indian Tribe, Lummi Indian Tribe and Confederated Tribes of the Colville Indian Reservation. Motion to Dismiss at 3. On February 21, 1979, this Court entered an order postponing consideration of jurisdiction to the hearing on the merits. Appendix [hereinafter App.] at 255. Although no party has raised any questions regarding the jurisdiction in the instant case, the Tribes briefly address it here.

This appeal is properly within the jurisdiction of the Court pursuant to 28 U.S.C. §1253 because the original action was properly within the jurisdiction of the three judge court pursuant to 28 U.S.C. §2281 as it then existed.[1] When this action was filed, a three judge federal district court was required by 28 U.S.C. §2281 to be convened in any action to enjoin enforcement of a state statute on grounds of its unconstitutionality under the Constitution of the United States.

In their Amended and Supplemental Complaint for Declaratory Judgment, Injunction and Damages, set out at App. 17, the Tribes sought injunctive relief against the State of Washington based on:

(1) A declaration that the State's cigarette excise tax, RCW Ch. 82.24, as applied to the Tribes, constituted an unconstitutional burden on Indian commerce "in violation of the preemptive right of Congress to regulate such commerce stated in Article 1, §8, cl. 3 of the United States Constitution . . . ." App. at 20-21.

(2) A declaration that the past and proposed actions of the State of Washington in stopping federally licensed, sealed trucks engaged in interstate commerce bringing tribal property to the Reservations constituted an unconstitutional burden on interstate commerce within the meaning of Article 1, §8, cl. 3 of the Constitution. App. at 23.

(3) A declaration that the enforcement measures of the State including the seizures outlined above, and the State's attempt to levy on Indian property denied the Tribes their property without due process of law and denied the Tribes equal protection of the law. App. at 24.

1. 28 U.S.C. §2281 was repealed by Act of Congress, 90 Stat. 119, in August, 1976. However, since this action was pending at the date of the repeal, it was not affected.



(4) A declaration that the assumption of jurisdiction over Indian reservations pursuant to Public Law 83-280 by the State of Washington was unconstitutional under the Fourteenth Amendment. App. at 25.

These multiple, interrelated claims provided an indisputable foundation for the convening of a three judge federal district court. *Query v. United States,* 316 U.S. 486 (1942); *Department of Employment v. United States,* 385 U.S. 355 (1966).

Although the Appellee Tribes also attacked the application and enforcement of the state tax laws on Supremacy Clause grounds, *cf. Swift and Co. v. Wickham,* 382 U.S. 111 (1965), the Tribes raised substantial constitutional grounds under other clauses of the Constitution. These claims are clearly not insubstantial. *See Goosby v. Osser,* 409 U.S. 512, 518 (1973).

On May 17, 1973, the date of filing of the instant case, the State of Washington claimed taxing authority over Washington Indian tribes and their enrolled members by virtue of its assumption of Indian jurisdiction under RCW 37.12 pursuant to P.L. 83-280. At the time, therefore, the taxing and Public Law 83-280 issues were interrelated.[2] The State's claim was not rejected until June 14, 1976, when this Court decided *Bryan v. Itasca County,* 426 U.S. 373 (1976). It was not until February 22, 1979 that Washington's partial assumption of jurisdiction was upheld by this Court in *State of Washington v. Confederated Bands*

2. The claim of unconstitutionality of the statute was enhanced significantly on April 29, 1977 when the Ninth Circuit Court of Appeals decided *State of Washington v. Confederated Bands and Tribes of the Yakima Nation,* 552 F.2d 1332 (1977), holding that Washington's partial assumption of jurisdiction violated the Equal Protection Clause of the United States Constitution.

*and Tribes of the Yakima Indian Nation*, .... U.S. ...., 58 L. Ed. 2d 740 (1979).

Further, as the District Court recognized, the Tribes' challenge of the state enforcement measures as violative of the Interstate Commerce Clause raises "a substantial federal question" under the Commerce Clause. 446 F. Supp. at 1350, Appendix to Jurisdictional Statement [hereinafter J.S. App.] at 14.

Finally, as noted above, the Tribes in their Complaint attacked Washington's cigarette excise tax laws, RCW Ch. 82.24, as violative of the Indian Commerce Clause. This question is clearly substantial. *See* Section III, *infra*, arguing that the state tax has been preempted by the Indian Commerce Clause because it interferes with essential tribal relations constitutionally reserved to Congress, and Section IV, *infra*, arguing that the state tax as applied and on its face, violates the Indian Commerce Clause of the Constitution because it makes no provision for "apportionment" between state and tribal taxes and thereby imposes a multiple tax burden which unconstitutionally discriminates against Indian commerce.

The other non-constitutional grounds raised by the Tribes were properly decided by the three judge federal district court by virtue of the established rule that whenever a three judge district court is required, it has jurisdiction over all grounds of attack upon a statute.[3]

3. *See* C. WRIGHT, LAW OF FEDERAL COURTS, §50 at 191 (1970), *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960). The three judge court also had jurisdiction to decide pendant and ancillary claims of Appellees because they all rested upon a single and interrelated complex of facts. *Haining v. Roberts*, 453 F.2d 1223 (5th Cir. 1971). *See also Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971); *Doe v. Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972); *Prigmore v. Renfro*, 356 F. Supp. 426 (N.D.Ala. 1972), *aff'd*, 410 U.S. 919 (1973).



## QUESTIONS PRESENTED

1. May Appellee Tribes levy a tax upon cigarettes sold on their Reservations to non-Indians in circumstances in which the tax is included in the purchase price and passed on to the buyer so that the legal incidence of the tax is upon the non-Indian?

2. Does superimposition of the state cigarette excise tax upon sales of cigarettes that are already subject to the regulation and tax imposed by the tribal ordinances constitute a prohibited interference with tribal self-government?

3. Is the state cigarette excise tax, as applied to sales of cigarettes by Appellee Tribes on their Reservations to non-Indians, preempted by the Indian Commerce Clause because it interferes with essential tribal relations which are the exclusive prerogative of Congress?

4. Is imposition of the state cigarette excise tax, as applied to the sales of cigarettes by Appellee Tribes on the Reservations to non-Indians, preempted by federal statutes, regulations and policies promoting tribal self-government, self-determination, and economic self-sufficiency?

5. Does imposition of the state cigarette excise tax on Reservation sales of cigarettes by the Appellee Tribes, which have already been subject to a tribal tax, impose a multiple tax burden which discriminates against Indian commerce in violation of the Indian Commerce Clause?

6. Is imposition of the state cigarette excise tax and the collection requirements set out in state statutes and regulations, as applied to licensed federal traders on the Reservations, preempted by the Federal Traders statutes?

7. What is the legal incidence of the state cigarette excise tax with respect to Reservation sales by Appelleee Tribes?

8. Does the State have authority to impose an excise tax, nominally for the privilege of using a motor vehicle within the State, but measured by the fair market value of the vehicle, upon motor vehicles, travel trailers and campers owned by Indians and used both on and off the Reservations?

## STATEMENT OF THE CASE

This statement is intended to supplement the Statement of the Case set out in the State Brief at 7-26. The essential facts in this case were stipulated in the Pre-Trial Order, App. at 28, 31-47, and are also set out in the opinion of the District Court.

The Appellee Tribes, Confederated Tribes of the Colville Indian Reservation, Lummi Indian Tribe and Makah Indian Tribe, are each located on remote and underdeveloped reservations; most essential goods and services are located off the Reservation. 446 F. Supp. at 1346, J.S. App. at 4. The Reservations are plagued by substantial unemployment, App. at 37, 41, and, like many other reservations, have an extremely "limited tribal tax base." 446 F. Supp. at 1362, J.S. App. at 37.

Each of the Appellee Tribes is a quasi-sovereign Indian tribe recognized by the United States and governed by a council under a constitution and bylaws approved by the Secretary of the Interior.[4] 446 F. Supp. at 1345, J.S. App.

4. The Makah Indian Tribe is organized under the Indian Reorganization Act of 1934, 25 U.S.C. §476; the Colville and Lummi Tribes voted in 1935 not to come under the provisions of the Act.



at 4. App. 60, 66 (Colville Confederated Tribes); App. 73, 78 (Lummi Indian Tribe); App. 80, 96 (Makah Indian Tribe). Each constitution provides that the Tribe has power to levy taxes on Indians and non-Indians, but requires any tribal ordinance asserting taxing power over non-Indians to be approved by the Secretary of the Interior.

Each Tribe has enacted a tobacco ordinance regulating the sale, distribution and taxation of cigarettes on its Reservation, and each ordinance has been approved by the Secretary of the Interior. The ordinances provide that the cigarette tax is a tax upon the distribution of cigarettes on the Reservations by the respective Tribes through their tribal outlets and require the amount of the tax to be added to the retail price of the cigarettes. The legal incidence of the tax therefore is on the purchaser of the cigarettes, and is imposed upon both members and non-members. The Colville Indian Tribe imposes a tax of four cents per package, $.40 per carton, and the Lummi and Makah Indian Tribes impose a tax of five cents per package, $.50 per carton.[5] Pre-Trial Order, §2.5, App. at 32-33.

The tribal cigarette taxes are critical sources of revenue for the funding of various tribal governmental programs. From 1972 through 1976, the Colville Tribe earned approximately $265,760 from its cigarette tax, the Lummi Tribe earned approximately $54,440, and the Makah Tribe earned approximately $13,490 from its tax. 446 F. Supp. at 1347, J.S. App. at 7. The tax revenues are used by the Tribes for a broad spectrum of governmental programs

5. The tribal taxing ordinances have been amended to impose the taxes described in the text and the amendments became effective before the entry of the Pre-Trial Order. The copies of the Colville and Lummi Ordinances set out in Exhibits 10.8 and 10.10 of the Prie-Trial Order, App. at 104, 118, do not reflect this amendment, however.

benefiting their members. *See* Pre-Trial Order §§2.12 and 2.19, App. at 36, 40. As the District Court summarized:

> The revenue generated by the taxes to date has been devoted to the partial funding of programs such as day care, education, nutrition, fire protection and alcoholism of reservation people.

446 F. Supp. at 1361, J.S. App. at 35.

Further, the tribal ordinances are not merely tax generating provisions, but are also "comprehensive scheme[s] for the licensing, regulation, and taxation of the sale of cigarettes on the reservations." 446 F. Supp. at 1348, J.S. App. at 8. Each ordinance provides that the tobacco products, including cigarettes, remain the property of the Tribe until sold to the ultimate consumer, requires the operator of the tribal outlet to obtain both tribal and federal trader's licenses supported by adequate personal and property liability insurance, and provides that no sales shall be made to minors. Each ordinance also sets forth penalties for violations.

Each ordinance provides that no more than three cartons of cigarettes shall be sold to any non-Indian purchaser, App. at 108, 115, 122, a restriction designed to prevent non-Indian purchasers from reselling the purchased cigarettes off the Reservation without paying state taxes. Under the provisions of the ordinances, the operator of the tribal outlet acts as agent of the Tribe in selling the cigarettes. He is, however, entitled to keep the difference between the wholesale cost which he pays to the Tribe and the retail price as his compensation.

For approximately nine years, the State of Washington has been attempting to require the Tribes to collect the state cigarette excise tax in the amount of $.16 per package, $1.60 per carton, on sales to non-Indians. Although the State maintains that the legal incidence of its tax as applied to sales by the Tribes to non-Indians is upon the non-Indian consumer, that is disputed by the Tribes.



Pursuant to the provisions of RCW 82.24.020, the state tax is levied upon the "sale, use, consumption, handling, possession, or distribution of all cigarettes . . . ." RCW 82.24.080 provides that it is the intent of the legislature to collect the tax from the person who "first sells, uses, consumes, handles, possesses . . . or distributes" cigarettes in the State, and provides that the legal incidence of the tax shall be imposed upon the first taxable event occuring within the State. The Washington State Supreme Court, *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744 (1974), and the State Department of Revenue, *see* WAC 458-20-192, App. V to State Brief, and Excise Tax Bulletin 504.08.192, App. W to State Brief, interpret the statute to mean that the legal incidence is upon the non-Indian purchaser in cases of sales by the tribal outlets.

The State also seeks to impose certain collection requirements upon the Tribes and tribal outlets. E.T.B. 504.08.192 would require the dealers to "demonstrate entitlement to make such sales without collection of tax" by keeping detailed records of sales to Indians. The tribal sellers would be required to record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations to which or within which such sales are made and the dollar amounts and dates of the sales. The dealer would also be required by the regulation to insist upon the presentment of a tribal identification card if the Indian purchaser is not known

personally to the dealer. 446 F. Supp. at 1359, J.S. App. at 29-30.

All cigarette and tobacco products are purchased by the Tribes with federally restricted tribal funds from authorized out-of-state wholesalers. The products are shipped directly to the Tribes by sealed cargo trucks of licensed Interstate Commerce carriers. The State has attempted to enforce its law against the Tribes by seizing cigarettes in the stream of interstate commerce bound for the Reservations, Pre-Trial Order §§2.8-2.9, App. at 34-35, and has declared its intention to continue such seizures in the future. *Id.* §2.10, App. at 35. At the present time, the State is subject to a Preliminary Injunction issued by the District Court which prohibits such seizures. 446 F. Supp. at 1345, J.S. App. at 3.

The economic and practical impact of enforcement of the state tax against the Tribes is undisputed. If the state tax is imposed, a total excise tax burden of $.20 per package of cigarettes sold on the Colville Reservation, and $.21 per package on cigarettes sold on the Makah and Lummi Reservations, will be imposed. This compares with a total excise tax burden of $.16 per package as to cigarettes which are sold *off* the reservation. According to the undisputed testimony of an expert economist, sales of cigarettes face a highly elastic demand curve with respect to their own price in a competitive market, and as a result, "the volume of cigarette sales on most reservations will fall drastically" if the state tax is superimposed. Exhibit 10.19, App. at 125-27. As the District Court summarized:

> The facts dictate that the tribal taxes could not be a continuing source of income if tribal cigarette sales to non-Indians are also subject to State's cigarette tax; tribal cigarette sales to non-Indians would be eliminated and cigarette sales commerce between the Tribes and non-Indians would be destroyed. Thus each Tribe's ability to fund its sponsored programs would suffer substantial interference.



446 F. Supp. at 1347, J.S. App. at 7-8.

This will in turn affect the ability of the Tribes to carry out their governmental programs. The District Court found that the result of imposition of the state taxes "will be the depletion of an already limited tribal tax base, probable destruction of the tribal enterprises and elimination of essential revenues needed for tribally sponsored programs." *Id.* at 1362-63, J.S. App. at 37. At the present time, nearly 90% of the Tribes' sales are made to non-Indians. 446 F. Supp. at 1347, J.S. App. at 7.

The Tribes have also successfully contested the application of the State's excise taxes on motor vehicles, RCW Ch. 82.44., and travel trailers and campers, RCW Ch. 82.50. The state statutes are labeled as excise taxes and are imposed and assessed annually upon a specified percentage of the fair market value of the vehicle for the privilege of using the vehicle within the State of Washington. Since each of the Reservations is remote and largely undeveloped, most essential goods and services needed by tribal members are located off the Reservation. Many reservation Indians own automobiles, and although some automobiles are used entirely on the Reservation, others are used both on and off the Reservation. Pre-Trial Order §§2.25-2.28, at 42-44.

## SUMMARY OF ARGUMENT

### I.

It has been settled for more than three-quarters of a century that tribal power to tax non-Indians relative to their on-reservation transactions with Indians is an essential attribute of the Tribes' original sovereignty never surrendered. *Morris v. Hitchcock*, 194 U.S. 384 (1904). The decisions of this Court also hold that Indian tribes have power to exercise civil jurisdiction over non-Indians involved in transactions with Indians on their reservations. *See Williams v. Lee*, 358 U.S. 217 (1959).

These powers have been repeatedly recognized by Congress. For example, after the Senate Committee on Indian Affairs had been specifically advised by the Commissioner of Indian Affairs that Indian tribes held power to tax non-Indians, Congress enacted the Indian Reorganization Act of 1934, 25 U.S.C. §476, which provided that any Indian tribe organized under the Act would continue to have "all powers vested by existing law." More recent statutes repeatedly recognize Indian tribes as units of government and Congress has adopted strong federal policies designed to encourage the exercise of tribal self-government. With respect to Appellee Tribes, the Secretary of the Interior has approved the assertions of tribal taxing power over non-Indians in their Constitutions and taxing ordinances.

*Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), does not undermine the civil and taxing authority of tribes. The Court explicitly restricted its holding to criminal jurisdiction, 435 U.S. at 195, 196 n. 7, and the reasoning of the Court is entirely inapplicable to this case. Not only have the three branches of government repeatedly recognized



tribal taxing powers and civil powers over non-Indians generally, but the Court itself reconfirmed the existence of these powers in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978), a decision which was rendered *after Oliphant*.

### II.

As distinguished from the tribes in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), each of the Appellee Tribes has enacted a comprehensive, federally approved ordinance regulating and taxing sales of cigarettes on its Reservation. The ordinances are both a critical source of revenues for essential tribal programs, and an exercise of the Tribes' powers of governance over the Reservations. It is undisputed that imposition of the state tax will not only substitute state substantive law for that of the Tribe, but destroy the tribal tax programs and jeopardize the governmental programs financed by them.

These impacts cannot be allowed to occur consistent with *Williams v. Lee*, 358 U.S. 217 (1959), which prohibits application of state laws which infringe on the right of reservation Indians to make their own laws and be ruled by them. *Id.* at 220. The *Williams* test was specifically designed to apply in situations like this one in which both a tribe and a state seek to apply their laws to an on-reservation transaction involving both Indians and non-Indians. The State may apply its law only up to the point where tribal self-government will be affected. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 179 (1973).

### III.

The Indian Commerce Clause, like the Foreign and Interstate Commerce Clauses, is not merely a grant of

power to Congress, but also a source of restrictions upon the power of the states. A review of the history surrounding the execution of the Indian Commerce Clause demonstrates that it was drafted by the Founding Fathers to correct a series of problems which had arisen under the Articles of Confederation. The Articles had given Congress power to regulate Indian affairs, but had contained two provisos, one restricting federal power to Indians who were not members of the states, the other providing that the "legislative right" of any state would not be violated. The qualifying language of the Articles had been interpreted by several states to sanction their own independent regulation of Indian affairs, including attempts to negotiate treaties with the Tribes and to wage war against them.

A Committee Report in the Constitutional Convention proves that the Indian Commerce Clause, in its present form, was drafted in direct response to these state assertions and was designed primarily to thwart state attempts to govern political relations with the tribes. The basic purpose of the Indian Commerce Clause was to federalize the political relations of the tribes to the exclusion of the states. To accomplish this end, the qualifying language of the Articles was deleted, and specific reference was made in the Clause itself to "Tribes."

In light of this historical background, and the danger of frustration of federal policy by disparate actions of the states, Indian commerce, like foreign commerce, is entitled to special constitutional protection, and a "more extensive constitutional inquiry" is required when the state attempts to tax Indian as opposed to interstate commerce. *Cf. Japan Line, Ltd. v. County of Los Angeles*, .... U.S. ...., 60 L. Ed. 2d 336, 346 (1979). In light of this background, it is clear



that the state tax has been federally preempted. It interferes with prerogatives concerning relations with the tribes which are constitutionally reserved exclusively to the federal government.

The decisions of this Court support this analysis. The Court's holding in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), was specifically premised upon the negative implications of the Indian Commerce Clause, and *Williams v. Lee* and *McClanahan v. Arizona Tax Commision* held that while the broadest reaches of Justice Marshall's opinion have been qualified by subsequent cases, the negative implications of the Indian Commerce Clause are still intact, at least when "essential tribal relations" are involved. *Moe*, which noted that there were no longer any "automatic exemptions" arising under the Clause in cases involving state taxation of reservation Indians, does not diminish the utility of this constitutional analysis in situations in which the tribes can show either an impairment of essential tribal relations or a state tax which discriminates against the protected commerce. In the instant case the Tribes have made both showings.

Moreover, Congress has not remained idle, and the state tax conflicts with actual federal statutes and policies. In numerous statutes, including particularly the Indian Reorganization Act of 1934 and the Indian Self-Determination and Education Assistance Act of 1975, Congress has specifically legislated a national policy promoting Indian self-government and tribal self-determination. Imposition of the state tax is in irreconcilable conflict with these federal goals.

An examination of the federal preemption decisions of this Court demonstrates that this Court has not hesitated

to strike down state law conflicting with federal policies, particularly when the field has been historically committed to federal rather than state law and when the state does not have a strong interest in protecting some essential interest of its citizens such as public health or safety. Since Indian affairs have been traditionally committed to Congress and since the only interest asserted by the State is its general need to raise tax revenue, there is little room here for the operation of state law.

The preemptive scope of federal law is particularly broad in Indian cases. *See McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973); *Fisher v. District Court,* 424 U.S. 381 (1976). In *Fisher,* this Court held that when a tribe exercises the powers granted it under its federally-approved constitution, "it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction." 424 U.S. at 390.

## IV.

The state tax, as applied to Appellee Tribes, will, in combination with the tribal taxes, impose a multiple tax burden on Indian commerce which is not shared by off-reservation commerce. It thereby unconstitutionally discriminates against Indian commerce. By analogy to the Interstate Commerce Clause decisions of this Court, this result is impermissible. *See Evco v. Jones,* 409 U.S. 91 (1972); *Boston Stock Exchange v. State Tax Commission,* 429 U.S. 318 (1977). A state may no more discriminate against Indian than foreign or interstate commerce. The Washington State tax does not give credit for taxes paid to the Tribes, and, if imposed, will not only discriminate against, but will actually destroy the protected commerce.



## V.

In *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685 (1965), this Court held an Arizona tax on the gross receipts of a non-Indian federal trader trading with Indians preempted by the Federal Traders statutes and regulations which it found to be so comprehensive as to leave no room for state laws imposing additional burdens on traders. 380 U.S. at 690. In the instant case, the situation is reversed because the State is attempting to impose burdens on an Indian federal trader doing business with non-Indians. Nevertheless the burden falls on the trader and has been preempted. In addition, state law, if applicable, would impose serious burdens regarding collection and record-keeping upon federal traders. The District Court currently held that these additional burdens were prohibited. 446 F.Supp. at 1359, J.S. App. at 29-30.

## VI.

The decisions of this Court hold that in construing a federal exemption from state taxes, the federal courts are not bound by the decisions of the state courts concerning its legal incidence. In the instant case, an examination of the state statute indicates that the legal incidence of the tax along with the duty of its collection and payment falls upon the first person who commits in the State any of a series of acts including possession, distribution and sale of cigarettes. Since all of these acts are performed by the Tribes, based on the statutory language, the legal incidence of the tax should fall upon them.

The State argues, however, that in the single case of sales by Indian tribes, the incidence falls upon the non-

Indian *purchaser* not the seller or wholesaler. The duty to pay the tax, however, remains upon the Tribe. If the State correctly interprets the statute, it obviously has a discriminatory effect. In every situation but one, the legal incidence and the obligation to collect and pay the tax fall upon the same person, the person who first performs any of the statutorily enumerated acts. In the single case of Indian Tribes, however, the obligation to pay the tax remains with the Tribe while the legal incidence moves on down the chain of events to the non-Indian purchaser. This distorted reading of the statute, designed only to extricate the State from the Court's holdings in *McClanahan* and *Moe*, cannot be sustained.

## VII.

The state motor vehicle excise tax, although nominally an excise tax imposed for the privilege of using a motor vehicle in the State of Washington, RCW 82.44.020, is measured by a percentage of the fair market value of the vehicle. In *Moe v. Confederated Salish and Kootenai Tribes, supra*, this Court struck down a Montana tax which was identical in operation. That tax, however, was labeled as a property tax. The decisions of this Court, particularly in the interstate commerce area, reveal that the validity of a tax ought not to turn on such nominal considerations but rather upon practical economic effects. *See Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). Notwithstanding the fact that automobiles may be used by their Indian owners partly off the reservation, the tax, no less than the one struck down in *Moe*, operates upon the property of a reservation Indian and is therefore invalid. *See McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973).



## ARGUMENT

### I. The Colville, Makah and Lummi Tribes Retain Power to Tax Non-Indians Doing Business with Indians on the Reservation.

#### *Introduction*

The State of Washington did not originally contest the jurisdiction of the Appellee Tribes to levy their cigarette taxes on non-Indians doing business with the tribal retail outlets.[6] But in its Brief on the Merits, it now argues, based on its reading of *Oliphant*, that "[a]mong those powers which are inconsistent with tribal status is the general power of taxation as applied to non-Indians." State Br. at 76. The primary focus of the State's argument, however, seems to be that while the Tribes may have power to tax as an incident of their power to exclude non-members from the Reservation, State Br. at 77, imposition of the state tax is valid because it does not conflict with the Tribes' power of exclusion.[7] *Id.* at 78-79.

Clearly, the decision of the District Court below and the arguments of the Appellee Tribes are grounded in part on the validity of the exercise of tribal taxing power under the circumstances of this case. Accordingly, the legal basis

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6. The State did file a Motion for Partial New Trial arguing that *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), and *United States v. Wheeler*, 435 U.S. 313 (1978), eliminated tribal jurisdiction to tax non-Indians. J.S. App. at 75. Similarly, in its Jurisdictional Statement at 18, relying on *Oliphant*, the State argued that

> [w]hether exercising the taxing power over non-Indians is inconsistent with the Tribes' status is an important federal question.

It did not, however, include the issue in its Questions Presented.

7. However, as discussed in Section II *infra*, the test for the validity of state jurisdiction over non-Indians engaged in transactions with Indians on a reservation is not whether it conflicts with tribal power to exclude non-members from the reservation but rather whether it interferes with tribal self-government. *See generally Williams v. Lee*, 358 U.S. 217 (1959); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

for such authority will be set out in this Brief. This discussion will also lay the foundation for the later sections of the Brief, particularly the argument that imposition of the state tax impermissibly interferes with tribal self-government, Section II, and the argument that the state tax has been preempted, Section III. At the outset, however, the Tribes would caution that despite the urging of Amicus Curiae supporting the State, this case does not present a suitable vehicle to determine generally the scope of tribal civil jurisdiction over non-Indians because of the limited nature of the exercise of jurisdiction by the Appellee Tribes.

The respective tribal taxes are levied on sales of cigarettes by the tribal retail outlets to Indians and non-Indians. All of the transactions at issue take place on trust land within the boundaries of the Reservations. The contacts between the non-Indians and the tribal businesses are entirely consensual and no non-Indian taxpayers have challenged the validity of the tribal tax. Further, because of the structure of the tribal taxes, the taxes are included in the purchase price of the goods sold and are automatically remitted by the taxpayer upon purchase. The Tribes therefore need not resort to either criminal or civil jurisdiction in tribal, federal or state court to enforce the tax. While the precedents discussed below which support the Tribes' ability to levy the taxes in question sanction considerably broader exercises of tribal civil and taxing jurisdiction over non-Indians, it should be kept in mind that the actual exercise of tribal jurisdiction in this case is quite narrow.



**A. The decisions of this Court and the lower federal courts recognize that tribal power to tax non-Indians on the reservation is an essential attribute of original sovereignty never surrendered by the Tribes. This power has been ratified by Congress in various statutes and the Executive Branch of the United States Government has consistently and explicitly recognized tribal power to tax non-Indians.**

Contrary to the urging of the State and supporting Amicus Curiae, *Oliphant* did not overrule, explicitly or by implication, the well-established precedents of this Court sustaining tribal civil and tax jurisdiction over non-Indians doing business on the reservation; nor did it signal a complete turnabout in Indian law concerning the respective powers of states and tribes over on-reservation transactions between Indians and non-Indians. Any question as to an Indian tribe's power to tax non-Indians doing business on the reservation has been settled for almost three quarters of a century. *See e.g., Morris v. Hitchcock,* 194 U.S. 384 (1904); *Buster v. Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906); *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation,* 259 F.2d 553 (8th Cir. 1958).

In *Morris v. Hitchcock,* 194 U.S. 384 (1904), this Court upheld the authority of the Chickasaw Nation to impose an annual permit tax upon non-Indian owned livestock grazing on the reservation. Although the tribal tax had been approved by the President pursuant to the provisions of the Curtis Act, the taxing power of the Chickasaw Nation over non-members clearly preceded the passage of the Curtis Act:

> Viewing the Curtis Act in light of the previous decisions of this court and the dealings between the Chickasaws and the United States, we are of the opinion

> that one of the objects occasioning the adoption of that act . . . *was to permit the continued exercise, by the legislative body of the tribe, of such power as is here complained of,* subject to a veto power in the President over such legislation, as a preventive of arbitrary and injudicious action.

194 U.S. at 393. (emphasis added)[8]

Similarly, in *Buster v. Wright,* 135 F. 947 (8th Cir. 1905) *appeal dismissed,* 203 U.S. 599 (1906), tribal jurisdiction to levy a permit tax on a non-Indian for the privilege of conducting business within the reservation was sustained. The Court of Appeals stated:

> Repeated decisions of the courts, numerous opinions of the Attorneys General, and the practice of years place beyond debate the propositions that prior to March 1, 1901, the Creek Nation had lawful authority to require the payment of this tax as a condition precedent to the exercise of the privilege of trading within its borders, and that the Executive Department of the government of the United States had plenary power to enforce its payment through the Secretary of the Interior and his subordinates . . .

135 F. at 949. More recently, in *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685 (1965), this Court strongly implied that a tribe could levy a tax on a non-Indian federal trader licensed to do business on the reservation. In striking down a state tax on this trader the Court stated:

> This state tax on gross income would put financial burdens on Appellant or the Indians with whom it deals *in addition to those Congress or the tribes have prescribed* . . .

380 U.S. at 691. (emphasis added) *See also Maxey v.*

8. Similar protections have been carried over to the present day. As discussed below, tribal constitutions asserting power to tax non-Indians typically include a requirement for Secretarial approval of any ordinance exercising that power.



*Wright,* 54 S.W. 807 (1900), *aff'd,* 105 F. 1003; *Crabtree v. Madden,* 54 F. 426 (8th Cir. 1893); *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation,* 231 F.2d 89 (8th Cir. 1956); and *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation,* 259 F.2d 553 (8th Cir. 1958), upholding tribal jurisdiction to tax as an exercise of inherent tribal sovereignty.[9]

Similarly, the Executive Branch has consistently recognized such taxing power. One of the opinions relied upon by this Court in *Oliphant,* 435 U.S. at 199, distinguished criminal from civil jurisdiction. 7 Op. Atty. Gen. 174 (1855). The Attorney General opined that while criminal laws of the United States assuming jurisdiction over crimes committed by white persons removed the criminal jurisdiction of the tribe over non-Indians, there was "no provision of treaty, and no statute which takes away from the Chocktaws jurisdiction of a case like this [a civil property dis-

9. Other cases supporting tribal jurisdiction to tax or otherwise exercise power over the property of non-Indians include *Hamilton v. United States,* 42 Ct. Cl. 282 (1907); *United States ex rel. Rollingson v. Blackfeet Tribal Court,* 244 F. Supp. 474 (D. Mont. 1965); *Hot Oil Service, Inc. v. Hall,* 366 F.2d 295, 296 (9th Cir. 1966); *Kain v. Wilson,* 161 N.W.2d 704, 705 (S. Dak. 1968); *Schantz v. White Lightning,* 502 F.2d 67 (8th Cir. 1974); *Littell v. Nakai,* 344 F.2d 486 (9th Cir. 1965), *cert. denied,* 383 U.S. 986; *O'Neal v. Cheyenne River Sioux Tribe,* 482 F.2d 1140 (8th Cir. 1973); *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976), *cert. denied,* 430 U.S. 983; *Mescalero Apache Tribe v. O'Chesky,* 439 F. Supp. 1063, 1073 (D.N.M. 1977); *Eastern Band of Cherokee Indians v. State,* No. BC-C-76-65 (D.N.C. August 27, 1976), *aff'd Eastern Band of Cherokee Indians v. North Carolina Wildlife Comm'n,* 588 F.2d 75 (4th Cir. 1978); *Petition for Cert. filed,* 47 U.S.L.W. 3730 (1979); *Wilson v. Turtle Mountain Band of Chippewa Indians,* 459 F. Supp. 366 (D.N.D. 1978). *See also,* Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands,* 124 U. PA. L. REV. 491, 503-507 (1975); Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians,* 40 L. AND CONTEMP. PROB. 166 (1976); Collins, *Implied Limitation on the Territorial Jurisdiction of Indian Tribes,* 54 WASH. L. REV. 479 (1979); Barsch, *Issues in Federal, State, and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique,* 54 WASH. L. REV. 531 (1979).

pute]." 7 Op. Atty Gen. at 179.[10] Moreover, two subsequent opinions of the Attorney General confirm tribal civil jurisdiction over non-Indians. *See* 17 Op. Atty. Gen. 134 (1881) and 23 Op. Atty. Gen. 214 (1900).[11]

Even more important, however, was an opinion of the Solicitor for the Department of the Interior in 1934. In §16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476, Congress provided that tribal governments organized pursuant to the Act would have certain enumerated powers *and* those "powers vested in any Indian tribe or tribal council by existing law." That same year, at the request of Congress, the Solicitor for the Department of Interior set forth the position of the United States as to the existing "powers of Indian tribes." Solicitor's Opinion, 55 I.D. 14 (1934). That Opinion provides:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe *and over nonmembers*, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

*Id.* at 46. (emphasis added)[12]

Moreover the Secretary of the Interior has approved the assertions of taxing jurisdiction in the Constitutions and

10. While, strictly speaking, the Opinion dealt with the question of civil jurisdiction over a white man who had become adopted into the Tribe, the critical point for present purposes is that the Opinion distinguishes between criminal and civil jurisdiction over non-Indians.

11. The former opinion held that permit laws of the Chocktaw and Chickasaw Tribes governing the terms under which nonmembers could enter and reside within their territory were valid as applied to white persons and the 1900 opinion upheld the validity of a permit tax of the Five Civilized Tribes as applied to citizens not members of the tribes desiring to transact business with the Reservation.

12. The Solicitor's Opinion was cited with approval by this Court in *United States v. Wheeler*, 435 U.S. 313, 328 (1978).



ordinances of each of the three Appellee Tribes. *See* CONSTITUTION OF THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, art. V, §1(e), approved April 19, 1938, App. 60, 66; CONSTITUTION OF THE LUMMI TRIBE, art. VI, §1(f), approved April 10, 1970, App. 73, 78; CONSTITUTION OF THE MAKAH INDIAN TRIBE, art. VI §1(g), approved May 16, 1936, App. 86, 90. Each Constitution requires that any taxing ordinance adopted by the Tribe affecting non-members be approved by the Secretary.[13] Each of the tribal taxing ordinances involved in the present litigation specifically asserts the power of the Tribe to tax non-Indians. Each has been approved by the Secretary.[14] These approvals are specific Executive affirmations that the Appellee Tribes have power to tax non-Inlians. *See also* Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40 L. AND CONTEMP. PROB. 166, 169-73 (1976).

Congress also has ratified tribal taxing powers over non-Indians. In confirming the existence in Indian tribes of all powers vested by existing law in §16 of the Indian Reorganization Act, 25 U.S.C. §476, Congress was well aware

13. The provisions in these tribal constitutions regarding taxing authority over non-Indians along with the requirement for Secretarial approval of taxes levied on non-Indians are typical. *See* F. COHEN, FEDERAL INDIAN LAW 439 (1966 Ed.).

14. Obviously, the provisions for Secretarial approval of the taxing ordinances provide substantial protection for non-Indians. As this Court noted in *Martinez v. Santa Clara Pueblo*, 436 U.S. 49, 66 n. 22:

> Many tribal constitutions . . . include provisions requiring that tribal ordinances not be given effect until the Department of Interior gives its approval. . . . In these instances, persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior.

A recent example of how this protection can operate was provided in the State of Washington when the Tulalip Tribe adopted a business and utility tax effective against both Indians and non-Indians on the Reservation. The Department of the Interior refused to approve the ordinance on the ground that it did not comply with the provisions of the Indian Civil Rights Act because the appeals process set up under the ordinance was inadequate. *See* Everett Herald, May 12, 1979 at 8-A.

that such tribal taxing power existed. Not only were tribal taxing powers over non-Indians well-recognized by the courts and the Executive Branch *before* the passage of the Act in 1934, but the legislative history of the Act indicates that Congress was specifically advised of this power. During a hearing before the Committee on Indian Affairs, Commisioner Collier of the Bureau of Indian Affairs, in response to an expression of concern by several committee members, presented a short brief describing Indian taxing power which referred to *Buster v. Wright* and its holding that Indian tribes may levy a permit tax on non-Indians within the reservation.[15] In this context, §16 of the Act specifically confirms tribal taxing power. *Iron Crow v. Ogala Sioux Tribe*, 231 F.2d 89, 99 (8th Cir. 1956). *See also* Goldberg, *supra* at 170.[16]

The Indian Reorganization Act generally was designed, among other things, "to grant certain rights of home rule to Indians." Preamble to Act, 48 Stat. 984. This Court has described the Act as "specifically intended to encourage Indian tribes to revitalize their self-government." *Fisher v. District Court*, 424 U.S. 382, 387 (1976). Although the governmental powers of the tribes preceded the passage of the Act, Congress, in setting up a statutory framework for the exercise of tribal governmental authority, provided that

15. *See* Hearings Before the Committee on Indian Affairs, United States Senate on S. 2755 and S. 3645 (73rd Cong. 2d Sess. 269-70 (1934)). The Commissioner's brief is set out at 268 et seq. and the discussion of *Buster v. Wright* appears at 269 under the heading "Power of Congress to Authorize an Indian Tribe to Levy Assessments and Taxes."

16. It is true, of course, that this Court in *Oliphant* held that the Indian Reorganization Act did not confirm tribal *criminal* jurisdiction over non-Indians. 435 U.S. at 195 n. 6. But that was surely only because the authorities were in agreement that no such powers existed in 1934 when the Act was passed. Tribal taxing power on the other hand, had long been recognized, as Congress was carefully advised both before and after the Act's passage.



when a tribe acts in its governmental capacity it implemented *federal* policy even though it exercised tribal authority. *Fisher v. District Court*, 424 U.S. at 390.[17]

The Indian Civil Rights Act of 1968, 25 U.S.C. §1301 et. seq., has a similar focus. As this Court noted in its comprehensive interpretation of the Act in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978):

> Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal "policy of furthering Indian self-government." [citations omitted] This commitment to the goal of tribal self-determination is demonstrated by the provisions of Title I itself.

The Court noted that rather than providing for a wholesale incorporation of constitutional requirements to tribal governments, Congress selectively incorporated and in some instances modified the provisions of the Bill of Rights so as to "fit the unique, political, cultural, and economic needs of tribal governments." 436 U.S. at 62. The Court also noted that the other titles of the ICRA manifest a "congressional purpose to protect tribal sovereignty from undue interference," reflected particularly in the provisions of the Act holding that states "may not assume civil or criminal jurisdiction over 'Indian country' without the prior consent of the tribe." 25 U.S.C.§§1321-26, 436 U.S. at 63-64. The protections of the ICRA extend to all persons, Indians and non-Indians. 25 U.S.C. §1302.[18]

17. *See* Section III C at 105, *infra*.

18. It is true that this Court in *Oliphant* rejected respondent's argument that the Indian Civil Rights Act of 1968, 25 U.S.C. §1302 et seq., recognized tribal *criminal* jurisdiction because the final version of the Act extended the constitutional protections to "any person" rather than

[Footnote continued on page 28]

Congress also gave implicit recognition to tribal civil jurisdiction over non-Indians in the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. §450. In *Bryan v. Itasca County*, 426 U.S. 373, 389 n. 14 (1976), this Court noted the focus of the Act on enhancing tribal self-government. 25 U.S.C. §450(a) contains a congressional statement of findings:

> The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that —
>
> . . .
>
> (2) the Indian people will never surrender their desire to control their relationships both among themselves *and with non-Indian governments, organizations, and persons.*

(emphasis added) In §3 of the Act, 25 U.S.C. §450a, Congress declared its policy to be

> to respond to the strong expression of the Indian people for self-determination . . .

and to maintain

> the Federal Government's unique and continuing relationship with and responsibility to the Indian people

only to "American Indians" as an earlier version of the Act had provided. The Court noted:

> The purpose of the later modification was to extend the Act's guarantees to "all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians." Summary Report on the Constitutional Rights of American Indians, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong. 2d Sess. 10 (1966). But this change was certainly not intended to give Indian tribes criminal jurisdiction over non-Indians. Nor can it be read to "confirm" respondents' arguments that Indian tribes have inherent criminal jurisdiction over non-Indians.

435 U.S. at 195 n. 6.

On the other hand, if tribes have neither criminal jurisdiction as *Oliphant* holds, nor civil or taxing jurisdiction as the State and its supporting Amicus Curiae contend, the change would have been completely gratuitous, an unpersuasive interpretation especially in light of the Indian Reorganization Act's confirmation of taxing power over non-Indians.



> through the establishment of a meaningful Indian self-determination policy. . . .

The recognition of tribal desire for control over non-Indians on the reservation and the declaration of congressional policy to promote tribal self-determination are highly significant. The tribes have successfully levied taxes on non-Indians doing business on the reservation with congressional, administrative and judicial approval for almost a century; the 1975 congressional endorsement of tribal self-determination occured in the context of this long-standing judicially-sanctioned exercise of tribal taxing jurisdiction over non-Indians.[19]

Moreover, in numerous other statutes, Congress has given general recognition to Indian tribes as units of local government. For example, in 40 U.S.C. §461, Indian tribes are eligible as local governmental units to receive federal assistance to facilitate comprehensive planning for urban and rural development. *See also* the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §1227(b)(4); the Economic Opportunity Act of 1964, 42 U.S.C. §2790(a) and (c); the Solid Waste Disposal Act, 42 U.S.C. §6903(13); the Housing and Urban Development Act of 1965, 42 U.S.C. §3106(b); and the Tribally Controlled Community College Assistance Act of 1978, 25 U.S.C. §1801 et. seq.

In a similar vein, Congress, in enacting 28 U.S.C. §1362, 80 Stat. 880 (1966), gave authority to tribes to bring lawsuits in federal court for any cause arising under the laws or Constitution of the United States in situations where the

19. In addition, the fact that Congress has at times expressly terminated the taxing power of Indian tribes, further evidences a congressional belief that such power, absent termination by Congress, exists. *See e.g.*, Act of April 26, 1906, §11, 34 Stat. 137, 141, terminating the taxing power of the Five Civilized Tribes. *Cf. Bryan v. Itasca County*, 426 U.S. 373, 392-93 (1976).

United States would itself have jurisdiction to bring the suit. As this Court recognized in *Moe*, the statute in effect authorizes the tribe to act as *parens patriae* to vindicate the legal rights of its members. 425 U.S. 468-69 n. 7 and 472-75. The Court noted that the substantive interest which Congress desired to protect in the Act was tribal self-government. *Id.* at 468 n. 7.

Several recent statutes give implicit recognition to tribal power over non-Indians. The Clean Air Act Amendments of 1977, 91 Stat. 685, 735, provide that for purposes of designation of areas by class concerning air quality, "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body." *Id.*, §164(c). The statute provides further that if any state is adversely affected by tribal redesignation of its reservation, it may invoke a mediation process. A tribe may do the same if it is injured by a state redesignation. *Id.*, §164(e). Clearly the Act recognizes tribal authority to make a designation effective within the entire reservation, notwithstanding the presence of non-Indians. *See also* the Surface Mining and Reclamation Act of 1977, 30 U.S.C. §1300, 41 Stat. 445, 523.[20] The Indian Child Welfare Act of 1978, 25 U.S.C. §1901 et. seq., vests in an Indian tribe exclusive jurisdiction "as to any State" over any child custody proceeding involving an Indian child who is domiciled or resides within the reservation of the tribe. 25 U.S.C. §1911. Since the

20. The Act provides that the Secretary shall consult with Indian tribes and prepare a report including "proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands." §710(a), 30 U.S.C. §1300. Indian lands are defined by the Act as including all land within the reservation including fee patent land. §701(9), 30 U.S.C. §1291(9).



Act defines Indian child as the "biological child of a member of an Indian tribe" it is clear that such jurisdiction may be exercised by the tribe notwithstanding the race of the Indian child's other parent.

While the federal statutes described in this section do not specifically mention tribal power to tax, a general power of taxation is so fundamental to the existence of any government that express federal recognition of Indian tribes as governmental entities carries with it an implicit recognition of that power. *Buster v. Wright, Iron Crow v. Oglala Sioux*, the Solicitor's Opinion regarding powers of Indian tribes, and Cohen all rely heavily on this factor in concluding that power to tax remains an essential attribute of tribal sovereignty. Further, our own well-established political traditions confirm that taxation is an absolutely essential function of government. In THE FEDERALIST, Alexander Hamilton wrote:

> Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of it, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue: either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and, in a short course of time, perish.

THE FEDERALIST No. 30 (A. Hamilton).

These considerations apply with particular force on the reservations because of the endemic poverty and the lack of an adequate tax base. *See* Section II, *infra*. Tribal governments are therefore particularly vulnerable, a factor giv-

en express consideration by this Court in its holding in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In refusing to hold that the Indian Civil Rights Act, 25 U.S.C. §1302, created a federal cause of action against the tribes, the Court stated that such a result "plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums . . . *but it would also impose serious financial burdens on already 'financially disadvantaged' tribes.*" 436 U.S. at 64. (emphasis added)

Further, in light of Congress' policy of Indian self-determination, it is not surprising that basic decisions, such as whether a tribe elects to tax non-Indians, have been left to the tribes themselves. It would defeat self-determination for Congress to determine in statutory detail what the tribes could and could not do, and Congress has never attempted to do so. The basic constraints on tribal action have been set out by Congress in the Indian Civil Rights Act of 1968 and, in light of its consistent ratification of tribal self-government, tribal powers to tax non-Indians remain extant. In light of the well-established history of exercise of tribal taxing power, if a basic change in the nature of tribal governments is to be made, and tribal power to tax non-Indians terminated, that decision rests in Congress.

**B. *Oliphant v. Suquamish Tribe* is expressly limited to the question of tribal criminal jurisdiction over non-Indians; it does not extinguish all tribal governmental authority over non-Indians on the Reservation.**

The State and its supporting Amicus Curiae argue that the executive, legislative and judicial authorities outlined in the previous section were overruled by implication in *Oliphant*. That argument is not well-founded. Not only



were these precedents unaffected, but the Court in *Oliphant* relied upon *Morris v. Hitchcock, supra*, 435 U.S. at 206, thereby implicitly confirming the continued vitality of tribal jurisdiction to tax non-Indians.[21]

Moreover, the Supreme Court in *Oliphant* did not mention much less overrule the series of Supreme Court precedents supporting tribal civil jurisdiction over non-Indians. *See Williams v. Lee*, 385 U.S. 217, 220 (1959); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 179 (1973); *United States v. Mazurie*, 419 U.S. 544, 554 (1975); *Fisher v. District Court*, 424 U.S. 382, 386 (1976).

The conclusion that the Supreme Court's holding in *Oliphant* cannot be gratuitously extended to overrule prior decisions of this Court upholding tribal civil jurisdiction and taxing authority over non-Indians is inescapable particularly in light of the post-*Oliphant* reaffirmation of tribal civil jurisdiction over non-Indians in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978):

> Tribal courts have repeatedly been recognized as appropriate forums for the *exclusive* adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

436 U.S. at 65 (citing *Fisher v. District Court*, 424 U.S. 382 (1976) and *Williams v. Lee*, 358 U.S. 217 (1959)). (emphasis added) It is quite impossible to reconcile the Court's statement with the assertion of the State and its Amicus Curiae that tribes no longer retain inherent civil or taxing jurisdiction over non-Indians. *See* Section I C, *infra*.

21. This Court cited *Morris v. Hitchcock* for the proposition that commonly shared assumptions of Congress, the Executive Branch and the lower federal courts concerning tribal jurisdiction carried considerable weight. In the section of *Morris* specifically cited by this Court in *Oliphant*, the Court had relied upon an opinion of the Attorney General of the United States holding that the Tribe had jurisdiction to tax non-Indians on the reservation.

In *Oliphant* itself, the Court made it explicitly clear that it dealt *only* with tribal *criminal* jurisdiction:[22]

> We granted certiorari, 431 U.S. 964 . . . to decide whether Indian tribal courts have criminal jurisdiction over non-Indians. We decide that they do not.

*Id.* at 195.

> The case before us is concerned only with the criminal jurisdiction of tribal courts.

*Id.* at 196 n. 7.

Further, the *rationale* of the Court in *Oliphant* does not support the conclusion that Indian tribes do not have civil and taxing jurisdiction over non-Indians involved in transactions with Indians on the reservation. Consideration of the factors that led the Court to conclude that tribal criminal jurisdiction over non-Indians was prohibited necessarily leads to the opposite conclusion with respect to tribal jurisdiction to tax.

A prominent factor in the Court's reasoning centered on the United States' comprehensive assumption of criminal jurisdiction over non-Indians. As the Court noted, 435 U.S. at 201, the extension of federal law to non-Indian crimes on Indian reservations happened very early in the course of this nation's dealings with the Indian tribes, beginning with the Trade and Intercourse Act of 1790, 1 Stat. 137. In 1817, Congress extended federal enclave law to Indian country generally, the only exception being for "any offense committed by one Indian against another." 3 Stat. 383 as amended, 18 U.S.C. §1152. The Court noted that it had held in *In re Mayfield*, 141 U.S. 107 (1891), that the general object of these criminal statutes was to reserve to the courts of the United States criminal jurisdiction of all actions to which its own citizens were parties on either

22. *Cf. United States v. Brady*, 579 F.2d 1121, 1134 (9th Cir. 1978).



side. The Court concluded that while Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, "Congress consistently believed this to be the necessary result of its repeated legislative actions." 435 U.S. at 204.

This pattern was well-established by the time that the United States entered into treaties with the tribes in the State of Washington. Thus, in one provision of the Treaty of Point Elliott, 12 Stat. 927 (1855), the Court noted, the Suquamish Tribe agreed to deliver up offenders against the laws of the United States to the federal authorities for trial. The Court concluded that this provision, read in conjunction with the federal criminal statutes, implied that the Tribe would not try non-Indians. 435 U.S. at 207-208. Since 18 U.S.C. §1152 had already been enacted, it was one of the elements of the Tribe's treaty-acknowledged dependent status that the United States would enforce its laws against non-Indian offenders.

When the Court's analysis is applied to tribal civil and tax authority an opposite conclusion is mandated because of the central fact that the United States has never asserted comprehensive *civil* jurisdiction over transactions between Indians and non-Indians on reservations. Accordingly, despite the tribal dependent status, there is no reason to believe that a corollary surrender of civil and taxing authority has been effected.

A second cornerstone of the Court's opinion in *Oliphant* was its conclusion that although Indian tribes retain elements of "quasi-sovereign" authority, they are prohibited from exercising those powers of autonomous states that are expressly terminated by Congress and "those powers inconsistent with their status." 435 U.S. at 208. The State and

its supporting Amicus Curiae argue that it is inconsistent with tribal status to exercise *any* jurisdiction whatsover over non-Indians on the reservation but do not explain *why* this is so as to exercise of civil or taxing jurisdiction.

In our view, the Court shed considerable light on the meaning of "dependent status" by its statement that

> [u]pon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and *their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty.* '[T]heir rights to complete sovereignty as independent nations, [are] necessarily diminished' *Johnson v. M'Intosh*, 8 Wheat. 543, 574 (1823).

435 U.S. at 209. (emphasis added) Thus, the Court explained, their power to dispose of their land to whomsoever they pleased was extinguished as was their power to exercise external political sovereignty in relations with other nations. Both conflicted with the interests of the overriding sovereignty of the United States. With respect to the tribes' relation to non-Indians, however, the critical interest of the United States was stated by the Court as follows:

> [F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from *unwarranted intrusions on their personal liberty.* The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.

435 U.S. at 210. (emphasis added)

Thus, the Court emphasized that the federal government had a strong interest in insuring that its citizens were not



denied the basic guarantees of the Bill of Rights which were then inapplicable to the tribes. *See Talton v. Mayes*, 163 U.S. 376 (1896).[23] In light of the tribes "want of fixed laws [and] of competent tribunals of justice," 435 U.S. at 210, the Court concluded that it was inconsistent with the tribes' status to try and punish non-Indians without regard to the basic constitutional guarantees implicated in a criminal prosecution. The assumption of lack of tribal criminal jurisdiction over non-Indians arose immediately, therefore, and Congress moved to fill the void beginning in 1790 by assuming jurisdiction over crimes by non-Indians on Indian reservations.

In contrast to the grave threat of deprivations of personal *liberty* implicit in the tribal exercise of criminal jurisdiction at that point in our nation's history, an exercise of tribal taxing power or civil authority clearly presents no such threat. Although constitutional problems obviously arise in the tax arena, nevertheless they relate primarily to property rights[24] not "personal liberty" and are thus not so paramount to suggest that it was *per se* implicit in the status of the tribes that such jurisdiction was surrendered.[25] Most exercises of civil jurisdiction simply do not invoke the government's duty of protection to the same degree and

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23. Now, of course, through the Indian Civil Rights Act of 1968, 25 U.S.C. §1301 et. seq., most of the provisions of the Bill of Rights apply to the tribes, and these protections extend to "any person," Indian or non-Indian.

24. In the instant case, of course, given the consensual nature of the trade and tax payment by the non-Indian purchasers, the "property rights" of the taxpayers are greatly attenuated to the extent they are present at all.

25. In a criminal proceeding, on the other hand, given the tribal "want of fixed laws," such guarantees as the freedoms from double jeopardy, cruel and unusual punishment, unreasonable searches and seizures, unreasonable bail and self-incrimination were implicated and the concerns of the sovereign for its citizens correspondingly increased.

consequently Congress never attempted to apply a civil law system governing the relations between Indians and non-Indians in tribal territory.[25] Governance of those relations has instead been left to the tribes.

Indeed, in light of this congressional failure to enact a civil regulatory or taxing system, the lack of state jurisdiction over tribal *territory* decreed in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)[26] would have resulted in a governmental vacuum over civil matters were tribal jurisdiction inherently prohibited. In sum, no overriding federal interests are so deeply threatened in an exercise of tribal civil or tax authority to lead to the conclusion that such jurisdiction is inherently prohibited as "inconsistent with [the tribes'] status."

Finally, the Court in *Oliphant* emphasized, after a detailed analysis, that the executive, judicial and legislative branches of our government shared an assumption that the tribes did not possess criminal jurisdiction. 435 U.S. at 197-206. In the few cases in which criminal jurisdiction over non-Indians had been asserted, the Court noted, it had been uniformly rejected (citing *Ex parte Kenyon*, 14 Fed. Cas. 353 (W.D. Ark. 1878), and two opinions of the

25. In the one civil area where Congress did act, in this early period, regarding the licensing and regulation of Indian traders, it never sought to displace tribal authority to tax as it had displaced tribal criminal jurisdiction in the federal criminal statutes. In fact, in *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965), this Court strongly implied that the Navaho Tribe could levy a tax on a non-member Indian trader. 380 U.S. at 691. The Court also noted that the regulations promulgated by the Department of the Interior authorized tribal taxes on non-Indian federal traders. 380 U.S. at 689-90.

26. In *Worcester v. Georgia*, the United States Supreme Court held that the State of Georgia could not apply its laws to a *non-Indian* engaged in missionary activities involving Indians on a reservation. At this time, the prohibition on state jurisdiction was territorial. *See* further discussion in Section III B, *infra*.



United States Attorney General issued in 1834 and 1855). Further, the Court stated that lack of tribal jurisdiction to try and punish non-Indians was implicit in its holding in *In re Mayfield*, 141 U.S. 107 (1891), that the general object of congressional statutes was to allow Indian nations criminal jurisdiction over their own members but to "reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side." 435 U.S. at 204 quoting from *In re Mayfield*, 141 U.S. at 115-116 (1891).

Congress also shared the assumption that Indian tribes did not have criminal jurisdiction over non-Indians, a fact that emerged from the Court's analysis of the series of amendments to the Trade and Intercourse Acts which restricted federal prosecution of Indians already tried and punished by tribal courts but failed to provide for parallel protection for non-Indians. 435 U.S. at 203.

As Section I A demonstrates, however, the Executive Branch has consistently recognized tribal taxing authority over non-Indians, Congress has ratified it and encouraged its exercise, and this Court has specifically and repeatedly confirmed the existence of tribal taxing authority and civil jurisdiction over non-Indians. *Oliphant* simply cannot be extended to these areas.

### C. This Court has repeatedly upheld tribal civil jurisdiction over non-Indians and these authorities have been reconfirmed by this Court after *Oliphant*.

One of the most glaring defects in the analyses of the State and its supporting Amicus Curiae is their assumption that the Supreme Court in *Oliphant* overruled, *sub silentio*, its decisions upholding generally tribal civil jurisdiction over non-Indians. Not only is the reasoning of *Oliphant*

inapplicable to civil and taxing jurisdiction as demonstrated above, but this Court has confirmed its civil jurisdiction decisions after *Oliphant*.

Justice Marshall first referred to tribal authority over non-Indians in 1823. In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 593 (1832), he stated:

> The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased, holds their title under their protection, and subject to their laws.

*See also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 538, 540. The leading case, however, is *Williams v. Lee*, 358 U.S. 217 (1959), where this Court held that to allow the State of Arizona to assert jurisdiction over a civil cause of action brought by a non-Indian against an Indian arising out of an on-reservation business transaction would impermissibly interfere with tribal self-government. The tribal court was the *exclusive* forum for resolution of such Indian/non-Indian disputes. The Court held:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there. *Cf. Donnelly v. United States, supra, Williams v. United States, supra.* The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navahos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.

358 U.S. at 223. Manifestly, this Court confirmed the jurisdiction of the tribal government over its reservation and held that no exemption from this sovereignty was available for non-Indians in civil matters.



Later cases have not narrowed this principle. In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 179 (1973), this Court stated that the *Williams* "interference with self-government" test was specifically tailored for situations involving non-Indians:

> It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. [citation omitted] In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

411 U.S. at 179.

In *United States v. Mazurie*, 419 U.S. 544, 558 (1975), this Court described its holding in *Williams v. Lee* as follows:

> *In holding that the authority of tribal courts could extend over non-Indians,* insofar as concerned their transactions on a reservation with Indians, we stated:
>
> > It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.

(emphasis added) Similarly, in *Fisher v. District Court*, 424 U.S. 382 (1976), the Court stated:

> In litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959); *accord Kennerly v. District Court of Montana*, 400 U.S. 423, 426-27 (1971) (per curiam).

424 U.S. at 386.

Finally, two post-*Oliphant* decisions put to rest Appellants' argument that *Oliphant* signals the termination of tribal civil and taxing powers over non-Indians involved in on-reservation contacts with Indians. Although the State and its supporting Amicus Curiae rely heavily on *United States v. Wheeler*, 435 U.S. 313 (1978), for their contention that exercise of civil jurisdiction over non-Indians is inconsistent with their status, they miss the critical aspect of *Wheeler* — its clarification that *Oliphant* did not overturn the venerable doctrine of Indian affairs that Indian tribes are quasi-sovereign entities which retain essential governmental powers that have not been terminated. Thus the Court stated:

> But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . [They] are a good deal more than 'private voluntary organizations.'" *United States v. Mazurie*, 419 U.S. 544, 557. [citations ommitted] The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. *See Oliphant v. Suquamish Tribe* [435 U.S. at 191].

435 U.S. at 323.[28]

28. The insistance of Amicus Curiae Salt River Project Agricultural Improvement and Power District that *Oliphant* held that "there exists within the United States but two sovereigns," Amicus Brief at 7, is a vast oversimplification. The *Wheeler* holding that Indian tribes are sovereign entities distinct from the United States government for "double jeopardy" purposes, with inherent powers which were never delegated to them by the federal government, makes it clear that there are more than just two "sovereign" entities in our federal system. The tribe is a third sovereign for some purposes, even though its sovereignty is subject to defeasance by the federal government.



Finally, and most importantly, this Court unequivocally reconfirmed its prior decisions concerning tribal civil jurisdiction over non-Indians in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The Court stated:

> Tribal courts have repeatedly been recognized as appropriate forums for the *exclusive adjudication* of disputes affecting important personal and property interests of both Indians and non-Indians. *See, e.g. Fisher v. District Court*, 424 U.S. 382 (1976); *Williams v. Lee*, 358 U.S. 217 (1959). . . . [other citations and footnote ommitted]

436 U.S. at 65-66. (emphasis added)[29]

In sum, the State's argument that tribal civil and taxing jurisdiction over non-Indians have been limited by *Oliphant* is completely untenable in light of the Court's failure to disturb these authorities in its opinion and because of its subsequent affirmation of tribal civil jurisdiction over non-Indians in *Martinez*.

**D. The tribal power to tax non-Indians doing business on the Reservation is an essential attribute of inherent tribal sovereignty, not merely an adjunct of the power to exclude.**

In its Brief, the State contends that tribal power to tax, to the extent it exists, is derived from the Tribes' treaty power to exclude non-members of the Tribe from the res-

29. *See also Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, ___ U.S. ___, 58 L. Ed. 2d 740 (1979), where the Court referred to the established rule of construction that ambiguities in federal legislation and treaties affecting retained tribal sovereignty are to be construed in favor of the tribes, ___, U.S. ___, 58 L. Ed. 2d at 758. *See also Bryan v. Itasca Co.*, 426 U.S. 373, 392 (1976); *see generally, McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

In addition, *Santa Clara Pueblo* is significant because of its clear reaffirmation of both the tribal sovereignty doctrine, 436 U.S. 55-56, and the *McClanahan* ruling that Indian tribal sovereignty provides the backdrop against which the applicable federal statutes and treaties must be read in resolving legal disputes involving Indian tribes. 436 U.S. at 60.

ervation, and that the Tribe "may impose terms in a nature of a license or permit fee upon which such permission will be granted." State Br. at 77. It argues that state taxes may be imposed on Indian/non-Indian transactions so long as they do not interfere with this tribal power to exclude.

The argument, although clever, is deficient for several reasons. First, it ignores the established test for the applicability of state laws to non-Indians doing business with non-Indians on the reservation — whether state jurisdiction would interfere with tribal self-government. *See generally Williams v. Lee,* 358 U.S. 217 (1959). A lack of conflict with the tribes' exclusion power is therefore not germane. Second, the argument is founded upon a false premise. Indian power to tax is an essential element of retained tribal sovereignty, recognized and confirmed by the treaties and by subsequent legislation. It is not merely an aspect of tribal power to condition entry of non-Indians to the reservation.

The State relies on *Buster v. Wright,* 135 F. 947 (8th Cir. 1905), *appeal dismissed,* 203 U.S. 599 (1906), but incorrectly reads the decision. The decision confirms that exclusion is a potential remedy for non-payment of taxes but is not the *source* of the right to tax. As the Court of Appeals stated:

> The authority of the Creek Nation to prescribe the terms upon which non-citizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. *It was one of the inherent and essential attributes of its original sovereignty.* It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic, it is taken from it. . . . The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek Tribe itself.

135 F. at 950. (emphasis added)



Felix Cohen, in his monumental work, HANDBOOK OF FEDERAL INDIAN LAW 143 (1941 ed.), states, relying on *Buster v. Wright:*

> The power to tax does not depend upon the power to remove and has been upheld where there was no power in the tribe to remove the taxpayer from the jurisdiction.

As Cohen intimates, tribal taxing power was upheld in *Buster v. Wright* even though Congress had terminated the Tribe's power to remove non-Indians in possession of a lot in its territory; other enforcement mechanisms, however, were still available to the Tribe. 135 F. at 954. Summarizing the nature and origin of the tribal taxing power, Cohen states:

> One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress is a proposition which has never been successfully disputed.

HANDBOOK OF FEDERAL INDIAN LAW at 142. *See also Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89, 99 (8th Cir. 1956), in which the Court of Appeals stated:[30]

> Inasmuch as it has never been taken away from them, the defendant Oglala Sioux Tribe possesses the power of taxation which is an inherent incident of its sov-

30. *See also Solicitor's Opinion, Powers of Indian Tribes,* 55 I.D. 14, 46 (1934):

> Chief among the *powers of sovereignty* recognized as pertaining to an Indian tribe is the power of taxation. . . .

(emphasis added)

> ereignty. . . . We conclude from the original precept of tribal sovereignty and the fact that the power of the Oglala Sioux Tribe to impose the tax or license in question has not been pretermitted by any federal statute or agency ruling thereunder, but, to the contrary, has been implemented by the Indian Reorganization Act, *supra*, that such power still exists.

Notwithstanding its aboriginal origins, this Court has recognized that implicit in the treaties with the tribes was a guarantee of self-government:

> In return for their promises to keep peace this treaty "set apart" for "their permanent home" a portion of what had been their native country, and provided that no one, except United States government personnel, was to enter the reserved area. *Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in* Worcester v. State of Georgia, *was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.*

(emphasis added) *Williams v. Lee*, 358 U.S. at 221-22. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Justice Marshall observed that in various treaties with the Cherokee Nation "the United States of America acknowledged the said Cherokee Nation to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America, in reference to acts done within their territory. . ." *Id.* at 538-39; *see also id.* at 540.

In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174-75 (1973) the Court stated:

> [T]he reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision.



Moreover, as the Court emphasized in *McClanahan*, 411 U.S. at 180 n. 21, the holding of *Williams* was that

> *absent governing Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

358 U.S. at 220 (emphasis by Court). The emphasized phrase, "absent governing Acts of Congress," strongly suggests that tribal self-government rests in the inherent sovereignty of the tribes and in the treaties rather than in congressional statutes.

The Stevens' treaties with the Western Washington Tribes, negotiated in 1854 and 1855, contain language virtually identical to the language held to guarantee tribal self-government in *Williams*.[31] Thus, Article 2 of the Treaty with the Makah of January 31, 1855, 12 Stat. 939 provides:

> There is, however, reserved for the present use and occupation of the said tribe the following tract of land . . . which said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or Agent. . . .

Article 2 of the Treaty of Point Elliott, of January 22, 1855,

31. In *Oliphant*, largely because its treaty required the Tribe to "deliver up" non-Indian offenders to the federal authorities, the Tribe was forced to concede that tribal criminal jurisdiction over non-Indians was not protected in the treaties. 435 U.S. at 197. In the instant case, however, the Tribes make no similar concession. Especially in light of *Williams* and subsequent cases, it is clear that the setting aside of the reservations for the exclusive use of the Tribes guaranteed the Tribes the right to govern them. It seems highly probable that the understanding of the Tribes at the time would have been that the Reservations were set aside as their homeland and that non-Indians choosing to enter the reservation would be subject to tribal laws, particularly in light of the treaty provision that non-Indians could reside there only with the permission of the Tribes. This construction makes particular sense in view of *United States v. Winans*, 198 U.S. 371, 381 (1905), which held that the Stevens' treaties were not "a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *See also United States v. Wheeler*, 435 U.S. at 327 n. 24 (1978).

12 Stat. 927, ratified March 8, 1859, to which the Lummi Tribe was a party, is to the same effect.[32] These treaties convey the same general guarantees of tribal sovereignty; there is no suggestion in that they are limited to the power to exclude.

Similarly, in the statutes discused in Section I B, *supra*, ratifying generally tribal powers of self-government, and supporting by implication tribal power to tax, contain no indication that the tribal power is restricted to a power to condition entry to the reservation. In determining the validity of the imposition of the state tax, therefore, this Court should look not to whether it conflicts with a tribe's power to exclude non-Indians, but rather to whether it interferes with tribal self-government in violation of this

32. The Colville Reservation was set aside by Executive Order in 1872, and not by treaty. Nevertheless, this makes no legal difference with respect to the status of the tribal government. Congress has repeatedly recognized the Colville Confederated Tribes as a tribe with governmental powers like other tribes and has likewise recognized the Colville Business Council as the governing body of the tribe. *See* Public Law 84-772, 70 Stat. 626 (1956); Public Law 87-24, 75 Stat. 45 (1961); Public Law 87-298, 75 Stat. 639 (1961); Public Law 90-278, 82 Stat. 69 (1968).

Further, in 1965, two bills were before Congress contemplating termination of the Tribe, which would have ended certain aspects of tribal government. In particular, §19 of H.R. 6925, 89th Cong. 1st Sess. (1965) and §18 of S. 1413, 89 Cong. 1st Sess. (1965) provided that all tribal powers conferred on the Tribes by their Constitution which were inconsistent with the provisions of the Act were to be terminated. Although the termination bill never became law, the proposed provisions indicate a congressional recognition that the Tribe possesses those governmental powers set out in its Constitution, absent termination.

Since Congress has not distinguished between treaty, statutory, and executive order reservations for purposes of federal policy, it would make little sense to create such a distinction here. A more reasonable construction would be to hold that in setting aside a "reservation," whether done by executive order, or statute, the basic general doctrines of Indian law, including those regarding tribal sovereignty, shall apply. As this Court stated in *Antoine v. Washington*, 420 U.S. 194, 203 (1975), regarding the Act of 1871 which resulted in the termination of the federal power to enter into treaties with Indian tribes:

> This meant no more, however, than that after 1871 relations with Indians would be governed by Acts of Congress and not by treaty.



Court's holding in *Williams v. Lee* and in conflict with the federal policies implemented by these statutes and treaties.

A holding by this Court that would deny Indian tribes the power to tax non-Indians doing business on the reservation, on the other hand, would effectively emasculate the tribal governments in this state and elsewhere. It would give non-Indians carte blanche to take advantage of the human and natural resources on the reservation, but deny the tribal governments the necessary power and revenue to function as viable governments.

As this Court made clear in *Williams v. Lee*, when the Reservations were set aside as a homeland for the Tribes, reserved for their "exclusive use" and in which non-Indians could enter only with the permission of the Tribes, the treaties implicitly guaranteed the Tribes the right to govern their Reservations subject only to the supervisory powers of Congress. These same principles have been furthered by Congress and by the Executive Branch; Congress has done nothing to terminate these general tribal civil powers and tribal powers to tax in particular. If this Court were to accept the invitation of the State and its supporting Amicus Curiae to hold that non-Indians may enter the Reservation totally free from the application of tribal civil laws, the promise of a homeland set aside for the exclusive use of the Indians, and subject to their governance, would be rendered nugatory. In light of those promises and the consequent Indian expectations, the prospect advocated in the Brief of Amicus Curiae Salt River Agriculture Improvement and Power District, for example, that a $600,000,000 coal-fired electric generation plant," Amicus Brief at 2, could be located on an Indian reservation but be totally immune from tribal law is patently offensive.

## II. Imposition of the State Cigarette Tax on the Tribally Taxed Sales on the Reservation Would Constitute An Egregious Interference With Tribal Self-Government Prohibited by Federal Law.

A cornerstone of the District Court's opinion was its conclusion that imposition of the state tax on the tribally taxed and operated sales would directly and substantially interfere with the exercise of tribal government. Based on the existence of the tribal tax, the District Court concluded that *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976), was distinguishable. In *Moe,* Montana's requirement that an individual Indian seller collect a tax imposed on non-Indians was held to be a minimal burden which did not frustrate tribal self-government within the meaning of *Williams v. Lee,* 358 U.S. 217, 223 (1959), or contravene any congressional enactment dealing with the affairs of reservation Indians.

At the threshold, the Appellee Tribes would dispose of the State's argument that *Moe* is indistinguishable from the instant case because of the presence there of an "administrative fee." State Br. at 87-88. The Supreme Court did not even *mention* the administrative fee in its opinion, and the District Court stated:

> The Council controls the purchase of cigarettes for resale by tribal members and charges an administrative fee in connection therewith. Although the tribes were authorized by their constitution to tax, *the tribes have not imposed any tax on the cigarettes sold in the smokeshops.*

*Confederated Salish and Kootenai Tribes v. Moe,* 392 F. Supp. 1297, 1313 (D.Mont. 1975). (emphasis added)

Similarly, the Tribes' Brief in *Moe*, after acknowledging that the Tribes charged an administrative fee, stated:

> The Tribes are authorized by their Constitution to tax cigarette sales within the Reservation, but they have not done so to date.

Tribes' Brief at 10. The Tribes also argued:

> *[I]f* the Tribes ever seek to exercise their tribal constitutional authority to impose a tribal cigarette sales tax on the merchandise, they would be seriously disadvantaged, for their tribal retailers would be forced to collect not only the tribal tax but the state tax as well. Recognition of this fact is a deterrent to the Tribes' imposing their own tax, which would preclude raising much-needed revenue.

*Id.* at 23-24. (emphasis added) Not only was there no tribal tax in *Moe,* but the record discloses no comprehensive pattern of regulation by the Tribe. While the United States District Court for Montana noted that the tribal council controlled the purchase of cigarettes for resale by tribal members, 392 F. Supp. at 1313, there is no indication that the sale itself was controlled or regulated by the Tribe. As the District Court summarized below:

> In *Moe,* the cigarettes at issue were sold by individual Indians operating businesses and not by tribal enterprises. There was no indication that the sales of cigarettes were tribally financed, managed or regulated. Although the tribe apparently charged an administrative fee, no tribal tax was imposed on the cigarettes sold in the smoke shops and the tribe itself received no direct benefits from the cigarette sales upon which it depended as a source of revenue for tribal programs. Thus, in the absence of any direct involvement by the tribe, the Court concluded that there was no interference with tribal self-government.[33]

446 F. Supp. at 1364, J.S. App. at 39-40.

In contrast, the District Court concluded that in this case the *Tribes* themselves were directly involved in the

33. The negative implication of the Court's statement in *Moe* that there was no interference with tribal self-government, of course, is that the state tax would have been stricken had the Court found such an interference.

conflict with the State, a conclusion specifically grounded upon the stipulated facts of the Pre-Trial Order. The taxing ordinances of the Appellee Tribes stand in vivid contrast to the lack of tribal involvement in *Moe*. As opposed to *Moe's* "administrative fee," the tribal cigarette taxes are substantial and an essential part of the funding of many tribal programs. As the District Court noted:

> For example, from 1972 through 1976, . . . the Colville Tribe, earned approximately $265,760 from its cigarette tax while the Lummi and Makah Tribes earned $54,440 and $13,490, respectively . . .

446 F. Supp. at 1347, J.S. App. at 7.

Moreover, as the District Court emphasized, the tribal ordinances are exercises of police as well as taxing power. Each ordinance provides that tobacco products, including cigarettes, shall remain the property of the Tribe until ultimately sold, requires the tribal outlet operator to obtain both tribal and federal traders licenses as well as adequate personal and property liability insurance, prohibits sales of tobacco products to minors, and restricts the numbers of cartons of cigarettes that can be sold to non-Indians to three cartons. Penalties are set forth in the ordinances for violations. 446 F. Supp. at 1347-48, J.S.App. at 7-8. As the District Court summarized:

> In short, each ordinance reads as a comprehensive scheme for the licensing, regulation and taxation of the sale of cigarettes on the reservation.

446 F. Supp. at 1348, J.S. App. at 8.

Further, in *Moe* there was no showing that imposition of the state tax would have any impact on the *Tribes* whatsoever. In the instant case, on the other hand, the determination of whether the imposition of the state tax will impermissibly interfere with tribal self-government



must be made in the following factual context:

> The State tacitly concedes the Tribes' source of cigarette tax revenue would dry up if they were forced to add the State tax to the cost of their cigarettes. The facts dictate that the taxes could not be a continuing source of income if tribal cigarette sales to non-Indians are also subject to State's cigarette tax; tribal cigarette sales to non-Indians would be eliminated and the cigarette sales commerce between the Tribes and non-Indians would be destroyed. Thus, each Tribes' ability to fund its sponsor programs would suffer substantial interference.

446 F. Supp. at 1347, J.S. App. at 7-8.

> The impact of superimposing the State's cigarette tax on the tribal taxes has already been discussed in this opinion. However, it bears repeating that at least with regard to a commodity as highly price elastic as cigarettes, the result will be the depletion of an already limited tribal tax base, probable destruction of the tribal enterprises and elimination of essential revenues needed for tribally sponsored programs.

446 F. Supp. at 1362-63, J.S. App. at 37.

The court ultimately concluded that "a restriction of the State's taxing power in this case is justified by proof of an actual interference with, if not destruction of, the Tribes' ability to carry out their tax financed self-governing functions." 446 F. Supp. at 1365, J.S. App. at 41. In these circumstances the state tax cannot be sustained.

In *Williams v. Lee*, 358 U.S. 217 (1959), the Court considered the question whether a non-Indian licensed by the federal government as a federal trader could sue an Indian in state court on a debt arising out of commerce on the reservation. The Court noted that the basic policy of immunizing Indians from state law had persisted since *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), in which the Court had stated that state laws could have *no* applica-

tion on Indian reservations and that the whole intercourse between the United States and Indian Nations was committed to the federal government. 31 U.S. (6 Pet.) at 559-561. The Court noted that the *Worcester* principles had been modified by the Court over the years in cases "where essential tribal relations were not involved," 358 U.S. at 219, but that the basic policies of *Worcester* remained. The Court summarized:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. *Cf. Utah and Northern R. Co. v. Fisher*, 116 U.S. 28 [1885]. . . . Congress has also acted consistently upon the assumption that the states have no power to regulate the affairs of Indians on a reservation.[34]

*Id.* at 220. In addition, referring to the 1868 Treaty between the Navajo Nation and the United States, the Court stated:

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34. The Court's citation of *Utah and Northern Railway* is especially significant in light of the State's reliance on the case for the proposition that "states have historically been permitted to tax non-Indians owning property on Indian Reservations or engaged in economic transactions with reservation Indians." State Br. at 61. However, in *Utah and Northern Railway*, the Court held only that imposition of a state tax on a railroad located on a reservation, which had no direct relation to the Tribe, was lawful. As the Court stated:

> To uphold that jurisdiction [of the territory] in all cases and to the fullest extent would undoubtedly interfere with the enforcement of the Treaty stipulations, and might thus defeat provisions designed for the security of the Indians. But it is not necessary to insist upon such general jurisdiction for the Indians to enjoy the full benefit of the stipulations for their protection. The authority of the Territory may rightfully extend to all matters not interfering with that protection. . . . If the Plaintiff lawfully constructed and now operates a railroad through the Reservation, it is not perceived that any just rights of the Indians under the Treaty can be impaired by taxing the road and property used in operating it.

116 U.S. at 31-32. Similarly, *Thomas v. Gay*, 169 U.S. 264 (1898), also relied upon by the State, involved no interference whatsoever with the Tribe or with the rights of Indians.



> Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.

358 U.S. at 221-22. The Court concluded:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence *would infringe on the right of the Indians to govern themselves*. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.

358 U.S. at 223. (emphasis added)

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), this Court clarified that the *Williams* self-government test was specifically tailored for situations like this one where both a state and a tribe seek to apply their laws to an on-reservation transaction involving both Indians and non-Indians:

> It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. [citations omitted] In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

411 U.S. at 179. *See also* the decision below, 446 F. Supp. at 1364, J.S. App. at 39. Similarly, in *Fisher v. District Court*, 424 U.S. 382 (1976), the Court observed:

> In litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on "whether the state action infringed on the

> right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959); *accord, Kennerly v. District Court of Montana*, 400 U.S. 423, 426-427 (1971) (per curiam). Since this litigation involves only Indians, *at least the same standard must be met before the state courts may exercise jurisdiction.* [citations omitted]

424 U.S. at 386. (emphasis added) To the same effect is *United States v. Mazurie*, 419 U.S. 544, 554 (1975).

Finally, this Court recently confirmed in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that the *Williams* test was intended to apply to situations involving both Indians and non-Indians. The Court cited *Williams* and *Fisher* for the proposition that

> [t]ribal courts have repeatedly been recognized as appropriate forums for the *exclusive* adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

436 U.S. at 65. (emphasis added)

Given that this is the type of dispute for which the *Williams* interference with self-government test was specifically designed, the question then becomes whether in distinction to *Moe*, application of the state tax in this case will impermissibly interfere with tribal self-government.

This determination should not be made in the abstract, but rather based on realistic expectations. As a practical matter, the Tribes would emphasize that tribal governments, like other governments generally, can only survive through their ability to raise revenues in order to finance essential governmental programs; in the case of the Tribes, however, the problems ordinarily facing units of local government are aggravated by the poverty of the Indians and the lack of an adequate tax base.

The indigency of Indians and their tribal governments,



and the economic problems faced generally on reservations are well-documented. In the FINAL REPORT OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION submitted to Congress on May 17, 1977, the Commission noted:

> [F]or the most part, Indian reservations remain underdeveloped and Indian people lack credit, remain poor, uneducated and unhealthy. From the standpoint of personal well-being the Indian of America ranks at the bottom of virtually every social statistical indicator. On the average he has the highest infant mortality rate, the lowest longevity rate, the lowest level of educational attainment, the lowest per capita income and the poorest housing and transportation in the land.

*Id.* at 7. *See also id.* at 91-94, 347-50. Reservations also lack the physical infrastructure such as transportation systems, power, water and communications systems which are necessary for economic development. *See id.* at 354-58.

The problems facing Indians generally throughout the United States exist in the State of Washington as in other areas. In its report to the Washington State House of Representatives entitled THE LEGAL RELATIONSHIP BETWEEN WASHINGTON STATE AND ITS RESERVATION - BASED INDIAN TRIBES (August 31, 1978), the State's Office of Program Research noted:

> While the number of Washington's Indians may have increased in the past 100 or so years, it is a fact that the Indians living in Washington today suffer from a standard of living far inferior to that of the state's non-Indian population. Task force reports prepared under the auspices of the Governor's Indian Advisory Council show that in terms of health care, life expectancy, educational level achieved, unemployment, alcoholism, suicides and a host of other indicators of standard of living, the state's Indian population lags far behind its non-Indian population.

*Id.* at 12. The report notes that there is an average unemployment rate of 42.5% among Indians living on or near

reservations in the State, *id.* at 19, and that the unemployment rate on the Colville Reservation was 57.8%, *id.* at 25, on the Lummi Reservation, was 55%, *id.* at 29, and on the Makah Reservation, was 27.2%, *id.* at 30.[35]

As the District Court noted, each of the Reservations involved in this litigation is isolated and underdeveloped, and most essential goods and services are located off the Reservations. 446 F. Supp. at 1346, J.S. App. at 4. Each of the Reservations has "an already limited tribal tax base." 446 F. Supp. at 1362, J.S. App. at 37. The limited tax base occurs not only because of the indigency of the Indians living on the reservation, but also because about 78% of the land located on reservations in the State of Washington is held in trust status and is therefore tax exempt. *See* OFFICE OF PROGRAM RESEARCH, *supra*, at 14.

The point that the Tribes would emphasize is that the survival of the fragile tribal governments throughout the United States will be as effectively compromised by a holding that the states can superimpose their taxes on tribal taxes as by a holding that the tribes lack power to tax in the first instance. As illustrated by this case, if the states can superimpose their taxes on tribal taxes that are enacted, any business taking place on the reservation will bear a total tax burden greater than off the reservation, and a strong incentive will be provided for non-Indians to do business elsewhere. From the Tribes' perspective, therefore, there can be no peaceful coexistence between state and tribal taxation of on-reservation transactions between Indians and non-Indians; imposition of state taxes will preempt the Tribes' practical, if not legal, ability to tax. If the Tribes are ever to achieve economic self-sufficiency, attrac-

35. *See also* 446 F. Supp. at 1346, J.S. App. at 5.



tion of non-Indian business to the reservations is essential. In light of the stipulated facts and these practical realities, the Appellee Tribes believe it indisputable that imposition of the state tax will substantially interfere with tribal self-government.

In its Brief at 69, the State concedes that

> [t]he district court found that loss of this revenue source would result in depletion of the tribal tax base, destruction of the tribal cigarette enterprises, and elimination of essential revenues needed for tribally sponsored programs.

The State's attempts to argue that nevertheless the state taxes would not interfere with self-government are not persuasive.

The first problem with the State's analysis is that it attempts to argue that the *Williams* test prohibits only exercises of state jurisdiction that threaten to *destroy* the self-governing ability of the Tribes:

> No one claims that the Tribe will be unable to govern their members if they cannot raise revenues by selling cigarettes to non-Indians.

State Br. at 69.

> [E]limination of this revenue source could well reduce the amount of revenues that the Tribe could spend elsewhere, but it can hardly be said to *actually* threaten the self-governing ability of the Tribe.

*Id.* at 70. But that, of course, is not the test. In *Williams* the Court stated that the test was whether the imposition of state law would "infringe on the right of Indians to govern themselves." 358 U.S. at 223. In *McClanahan*, the Court stated that the state could protect its interest over non-Indians by asserting its jurisdiction only "up to the point where tribal self-government would be *affected*." 411 U.S. at 179. (emphasis added) Clearly there was no showing in

either *Williams* or *Fisher*, both of which voided state jurisdiction, that the tribal government would have been destroyed. In fact, in *Williams*, the interference with self-government struck down by the Court was simply an "undermining" of the authority of tribal courts. 358 U.S. at 223. In *Fisher v. District Court*, application of state law was disallowed because it "would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves." 424 U.S. at 387-88.

In contrast, the interference found by the District Court, that imposition of the state tax would destroy the tribal enterprises and tax systems and interfere with the ability of the Tribes to perform essential governmental services, is clearly more substantial. The interference is direct, comprehensive, and ultimately ruinous.

In these circumstances, the District Court obviously applied the *Williams* test in a scrupulously limited manner. It held:

> [T]he Tribes have the burden of establishing that a challenged State regulation "frustrates tribal government," *see Williams v. Lee*, 358 U.S. 217, 219-220 (1959), or runs afoul of any congressional enactment dealing with the affairs of reservation Indians, *United States v. McGowan*, 302 U.S. 535, 539 (1938).

446 F. Supp. at 1356-57, J.S. App. at 25, citing *Moe*, 425 U.S. at 483. In addition, the court specifically refused to hold that a merely theoretical conception of interference with tribal government was sufficient to invalidate the tax:

> [W]hat the courts must avoid is utilizing the *Williams* test to strike down such state regulation based on "merely theoretical conceptions of interference with the function of [tribal] government." In other words, if a tribe has proved and/or a state concedes that the state regulation causes actual interference with the performance of the governmental obligations, the courts must, consistent with *Williams*, strike the regulation down.



446 at 1363-64, J.S. App. at 39. The court also found that an indirect economic impact was insufficient to void a state tax, 446 F. Supp. at 1364, J.S. App. at 39, but held:

> [A] restriction of the State's taxing power in this case is justified by proof of an actual interference with, if not destruction of, the Tribe's ability to carry out their tax financed self-governing functions.

446 F. Supp. at 1365, J.S. App. at 41.[36]

In light of the fact that the Tribes have enacted a comprehensive regulatory scheme, 446 F. Supp. at 1348, J.S. App. at 8, the State's assertion that imposition of the state tax will have a *merely economic effect* on the Tribes, State Br. at 69-70, is unwarranted. Nevertheless, even this concession by the State is critical in light of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In its Brief at 69, the State concedes that it does not dispute that imposition of the State tax will "discourage, if not entirely eliminate" the tribal enterprises. The State also concedes that imposition of the state tax "will have a negative impact upon Tribal revenues available for expenditure on Tribal programs." *Id.* In *Santa Clara Pueblo*, the Court stated that such a financial burden interfered with a congressional goal of protecting tribal self-government:

> Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it

36. The substantiality of the interference clearly distinguishes this case from the authorities relied upon by the State. State Br. at 64. Thus in *Fort Mojave Tribe v. County of San Bernadino*, 543 F.2d 1253, 1258 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), the court described the impact as "an indirect economic burden." *Accord Mescalero Apache Tribe v. O'Cheskey*, 439 F. Supp. 1063, 1073 (D.N.M. 1977). Moreover, these cases seem to have "watered down" the *Williams* test and their correctness is open to question.

> might be in securing compliance with §1302, plainly would be at odds with the congressional goal of *protecting tribal self-government*. Not only would it undermine the authority of tribal forums, [citing its earlier discussion of *Williams* and *Fisher*] but it would also *impose serious financial burdens on already "financially disadvantaged" tribes*. [citation omitted]

436 U.S. at 64. (emphasis added) The Court's statement is an explicit repudiation of the contention made here by the State that an economic impact does not interfere with tribal self-government. Such a financial burden is no less violative of the *Williams* test than of congressional policies protecting self-government. *See* Section III C, *infra*.

Not only must the State's characterization of the lack of interference with the tribal governments be rejected, but so also its repeated efforts to label the tribal tax system as an attempt to "market a tax exemption for non-Indian citizens of the State of Washington." State Br. at 79. The District Court responded to this argument, as to the State's argument that the Tribes were creating a tax haven, by pointing out that

> there is no preemption absent tribal taxation, and to the extent the Tribes impose their tax, there is no tax haven.

446 F. Supp. at 1362, J.S. App. at 25. Whatever applicability the State's characterization might have had to the facts in *Moe*, in the instant case, where the tribal taxes are imposed on all sales of cigarettes on the Reservations, it is entirely clear that no tax haven exists.[37] Further the rationale for invalidating the State tax has nothing to do with

37. Indeed, since the tribal tax is imposed on *all* sales of cigarettes, including those to Indians, *no* tax immunity exists even for Indians. In imposing the tribal tax, in effect, the Tribes have required their members to surrender their tax immunities to the tribes since, as *Moe* makes clear, absent tribal taxation there would be no taxation of Indians at all given the State's inability to tax Indians on a reservation.



Indian immunity from state taxation; state law is inapplicable because it interferes with tribal government.

In addition, the Appellee Tribes would reemphasize that the tribal ordinances constitute a comprehensive regulatory scheme. Imposition of state law upon these transactions is a violation of self-government not only because of its extreme financial impact on the Tribes and on the Tribes' ability to carry out government functions, but also because it has the same substantive interference with the governmental authority of the Tribes over their Reservations that this Court struck down in *Williams* and *Fisher*. These tribal ordinances are not merely tax raising enactments, but they are also regulatory measures that cover all aspects of commerce in cigarettes on the Reservations. Indeed, taxes in general are not merely revenue raising measures, but also important instruments of governmental policy. Taxes can be designed to have strong distributive functions and they may be utilized to condition or control the rate of growth or determine the areas in which the growth takes place.[38] Indian reservations are particularly in need of the tools provided by various tax measures because of their underdevelopment and their vulnerability to exploitation by well-financed off-reservation entrepreneurs. The states, consistent with *Williams, McClanahan* and *Fisher*, cannot be allowed to disrupt the implementation of these policy decisions on Indian reservations, decisions committed by federal law to the governance of the tribes.

Finally, in determining whether the State has impermissibly interfered with tribal self-government, the Appellee

38. Similarly, it is a common feature of state tax programs to set lower tax rates relative to surrounding states in order to encourage business or industry to locate in that state. Indian tribes should not be denied the same instruments of policy which are commonplace among the states.

Tribes suggest that the criteria utilized by the Court in support of its conclusion in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that the amendments to the Fair Labor Standards Act unconstitutionally interfered with state sovereignty, are entirely applicable here. They are quite helpful in applying the the *Williams* test.[39]

In *National League of Cities*, this Court granted jurisdiction in order to consider whether a series of amendments to the Fair Labor Standards Act, which applied the minimum wage and maximum hour protections of the Act to state and local governments, "intrude upon the States' performance of essential governmental functions." 426 U.S. at 839. In its decision, the Court emphasized that Congress could not exercise its power in a fashion that "impairs the States' integrity or their ability to function effectively in a federal system." 426 U.S. at 843, citing *Frye v. United States*, 421 U.S. 542, 547 n. 7 (1975). The Court noted that the federal law would have a "significant impact on the functioning of the governmental bodies involved" and might require a "forced relinquishment of important governmental activities." 426 U.S. at 847. It held that the 1974 amendments "will impermissibly interfere with the integral governmental functions of these bodies" and would leave little of the States' "separate and independent existence." 426 U.S. at 851. The Court concluded that Congress lacked

39. Interestingly, *National League of Cities* was decided ten days after *Bryan v. Itasca County*, 426 U.S. 373 (1976). This is significant in light of the parallels between the *National League of Cities* protection for state governments and *Bryan's* strong language about preservation of tribal government. In *Bryan*, the Court noted that Public Law 83-280 was not designed to undermine or destroy tribal government and convert the affected tribes to little more than private voluntary organizations. 426 U.S. at 388-89. The Court emphasized that Public Law 83-280 contained no grant of jurisdiction over the tribes themselves and held that Congress contemplated the continued vitality of tribal government.



power to "devour the essentials of State sovereignty." 426 U.S. at 855.

These considerations are directly applicable to the case before the Court except, of course, that it is the State impairing the ability of the Tribes to function as governments rather than the United States interfering with the prerogatives of the states. The governmental interference implicit in the State's levy and collection of its taxes, however, would be no less severe. Imposition of state taxes will, as a practical matter, totally destroy the ability of the Tribes to tax the same transactions. Indian tribal governments, like other governments, simply cannot function in a fiscal vacuum, and superimposition of the state taxes in this case will seriously interfere with the integrity of tribal governments and their ability to function in our system. Moreover, substitution of state law for that of the Tribes to govern these transactions in Indian commerce on the Reservations, directly infringes upon the right of the Tribes to be governed by their own substantive laws. Such fundamental and far reaching interferences with tribal self-government cannot be squared with this Court's decisions in *Williams*, *McClanahan*, *Fisher* and *Santa Clara Pueblo*.

## III. The Application of the State Cigarette Excise Tax to the Tribal Enterprises Has Been Preempted by the Relevant Treaties and Statutes Which Guarantee Tribal Self-Government.

### *Introduction*[40]

Article I, §8 of the Constitution provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian

40. Counsel wishes to acknowledge the assistance of Professor Robert Clinton in the research and drafting of Section III of this brief.

Tribes." It has been well-established since the middle of the 19th century that the Commerce Clause has two aspects: it is not only a grant of power to the federal government, but also a limitation on the power of the states. *See e.g. Cooley v. Board of Wardens of the Port of Philadelphia,* 53 U.S. (12 How.) 299 (1851); *Japan Line, Ltd. v. County of Los Angeles,* ..... U.S. ....., 60 L.Ed. 2d 336 (April 30, 1979). Thus, this Court recently observed in *Hughes v. State of Oklahoma,* ..... U.S. ....., 60 L. Ed. 2d 250, 255 (April 24, 1979):

> The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for congressional action, but, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation.

As Justice Jackson observed in *H.B. Hood and Sons, Inc. v. DuMond,* 336 U.S. 525, 534-35 (1949):

> The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.

The constitutional grant of power to Congress to "regulate Commerce with the Indian Tribes" has been frequently cited as a source of the "plenary" power of Congress over Indian affairs. *See e.g., McClanahan v. Arizona Tax Commission,* 411 U.S. 164, 172 n. 7 (1973); *United States v. Mazurie,* 419 U.S. 544, 554 (1975); *Williams v. Lee,* 358 U.S. 217, 219 n. 4 (1959). In *United States v. Forty-Three*



*Gallons of Whiskey,* 93 U.S. 188, 194 (1876), this Court likened the grant of power to that over foreign commerce:

> Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes — a power as broad and free from restrictions as that to regulate commerce with foreign nations.

*See also United States v. Holliday,* 70 U.S. (3 Wall) 407, 417-18 (1865).

This Court, however, has had less occasion to explicitly mark out the "negative implications" for state power which necessarily flow from the Indian Commerce Clause. Nevertheless, the decisions of this Court over the past century and a half demonstrate that the Clause, no less than the Interstate and Foreign Commerce Clauses, does impose substantial restrictions on state power. *See* Section III B., *infra.* As this Court noted in *Rice v. Olson,* 324 U.S. 786, 789 (1945), "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."

Although there is no longer any blanket constitutional exemption that absolutely prohibits all state law from applying on the reservation, at least if it does not affect tribal self-government or any rights of individual Indians, *see Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 483 (1976), core protections from the Indian Commerce Clause have been carefully preserved. The history surrounding the execution of the Indian Commerce Clause indicates an even stronger perception by the Founding Fathers of the need to exclude the states from regulating "commerce with the Indian tribes" than from regulating interstate or foreign commerce. In this case, since the State is attempting to tax on-reservation sales by tribally-operated and taxed enterprises to non-Indians, an explicit

inquiry into the meaning of the Indian Commerce Clause is called for; after all, the State is attempting to tax directly the very core of the subject matter of that Clause — commerce with the Indian tribes.

Two central "negative implications" necessarily flow from the Indian Commerce Clause: first, the Clause was designed to federalize the political and economic relations with the *tribes*, to the exclusion of the states. A state tax assessed on commerce with the tribal enterprises, which directly impairs the government of the reservations, is therefore prohibited. *See* Section III A, *infra*. Second, at an absolute minimum, states may no more discriminate against Indian commerce than against foreign or interstate commerce. State taxes, which, in combination with tribal taxes, impose a cumulative burden on Indian commerce greater than that borne by off-reservation commerce cannot be sustained. *See* Section IV, *infra*.

The Tribes will also dispose of the State's contention that this Court's statement in *Moe* concerning the lack of any "automatic" constitutional exemption, 425 U.S. at 481 n. 17, forecloses this inquiry into the constitutionally implied restraints on state power. The Court's statement in *Moe* was rendered in a context involving neither discrimination against Indian commerce nor infringement on tribal government. Notwithstanding the lack of any automatic constitutional exemption for Indians generally, a constitutional violation is shown when a tribe demonstrates either discrimination against Indian commerce by state law or state impairment of the political and economic relations of the tribal governments themselves.

Finally, this section examines the federal statutes which carry out the policies underlying the constitutional federalization of relations with the tribes; it demonstrates that in light of the specific statutes confirming and advancing tribal self-government as implemented in these federally-approved tribal ordinances, state taxation of the same transactions is preempted.



**A. The Indian Commerce Clause was intended to federalize the political and economic relations with the Tribes to the exclusion of the states.**

The history behind the adoption of the Indian Commerce Clause and contemporaneous documents strongly indicate that the Clause was intended to nationalize political and economic relations with the Indian tribes and preempt state authority over those relations. This central theme pervades the evolution of the commitment of powers over Indian affairs to Congress.

The documents surrounding the drafting of the Clause reveal a well-focused concern over the particular language of the Articles of Confederation, which granted Congress the "sole and exclusive right and power of regulating the trade and managing all affairs with the Indians not members of any of the States," but subject to the proviso that "the legislative right of any state within its limits not be infringed or violated." The proviso was interpreted by several states to sanction their own independent regulation of relations with tribal governments. In the Constitutional Convention, however, the view that regulation of relations with the tribes belonged to the national government, not the states, prevailed. In the Indian Commerce Clause, therefore, as it finally emerged from the Convention, the qualifications in the Articles were deleted and specific reference made to commerce with the "Indian *Tribes*." These changes, coupled with the recognition in Article VI of the suprem-

acy of the treaties already made with the tribes, indicate a large measure of constitutional protection for essential *tribal* relations.

The perceived need for uniform national power to govern relations and trade with Indian tribes dates back to the colonial period and is even more firmly grounded historically than national control of interstate and foreign commerce. *See generally,* F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS, Ch. 1 (1962). In 1754 at the Albany Congress, Benjamin Franklin drafted a "Plan of a proposed Union of the several Colonies" which committed to a proposed national government many important powers over Indian affairs, including the power to "hold or direct all Indian treaties," the power to "make peace and declare war with the Indian Nations," and the power to "make such Laws as they judge necessary for the regulating of all Indian trade." 6 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 889, 890 (O'Callaghan ed. 1885) (hereinafter "N.Y. COL. DOC."). Simultaneously and independently, the English Board of Trade proposed to the Crown a plan of general concert among the Colonies explicitly designed to put Indian affairs under a single direction.[41] *Id.* at 903-06. Both proposals arose from

41. Beginning in 1755, the British government implemented these proposals by centralizing the control of Indian affairs in officials directly responsible to the Crown. *Id.* at 11-23. For example, in the Proclamation of 1763, the Crown imperialized the control of land cessions from the Indians, a matter formerly left to colonial authorities, by establishing a temporary line of demarcation for future non-Indian settlement, and directing that all applications for Indian land cessions and patents be forwarded to England. *Id.* at 20. *See also,* DOCUMENTS RELATING TO THE CONSTITUTIONAL HISTORY OF CANADA *1759-1791,* 119-123 (Short and Doughty, eds. 1907) (text of Proclamation of 1763). In 1764 the Board of Trade proposed a plan to establish an imperial department of Indian affairs and to put "the regulation of Indian Affairs, both commercial and political throughout all North America, upon one general system, under the direction of officers appointed by the Crown, *so as to put aside all*



the failure of the colonies to implement severally a successful Indian trade policy and the consequent alienation of Indian tribes. *See* PRUCHA, *supra,* 9-11 (1962).

Thus, before the Revolution, both the Colonists and the Crown recognized and supported the need for unified national management of Indian affairs. Subsequent events in the period between the Revolution and the adoption of the Constitution solidified this perception and enhanced the desire of the Framers to protect constitutionally the relationship between the tribes and the national government from state interference. In this vulnerable period of our history, given the hostilities with Great Britain, the United States was particularly anxious to promote friendly relations with the tribes, and in 1775, the Continental Congress inaugurated a federal policy designed to promote that end.

*local interfering of particular Provinces, which has been one great cause of the distracting state of Indian affairs in general.*" 7 N.Y. COL. DOC. 634-36, 637-41. (emphasis added)

Another ilustration of the attitude of the Crown is found in a pre-Revolution dispute between the colony of Connecticut and the Mohegan Indians. *See* J. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS, 442 et. seq. (1950). One of the procedural issues concerned whether the dispute should be heard by the colonial courts of Connecticut or by a royal commission, the latter having authority in disputes involving British subjects and a sovereign nation. *Id.* at 428. The dispute involved title to land formerly held by the Mohegan Indians. Regarding the issue of its jurisdiction, the Commission ruled, according to Smith

> that the Indians were distinct people, that the property of the soil was in the Indians, and that royal charters did not *ipso facto* impropriate lands therein to subjects until fair and honest purchases thereof were made from the natives. *A dispute as to property and lands between a distinct people and English subjects could not be determined by the laws of England, but only by a law equal to both parties, the law of nature and nations.* And it was upon this foundation that these commissions had been most properly issued.

*Id.* at 434. (emphasis added) Ultimately the decision of the Royal Commission was affirmed. *Id.* at 442. The point here emphasized is the rejection of the argument advanced by Connecticut that the dispute ought to be heard by colonial courts.

PRUCHA, *supra*, at 27. *See generally*, W. MOHR, FEDERAL INDIAN RELATIONS 1774-1788 (1933). These policies were carried over into the Articles of Confederation.

In Article IX of the Articles of Confederation, the Congress was expressly granted "the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of any state within its limits be not infringed or violated . . . ." The uneasy and ambiguous compromise reflected in the two provisos of Article IX plagued the efficient regulation of Indian affairs throughout the period of the Articles of Confederation. Three states, Georgia, North Carolina, and New York claimed power to regulate economic relations with the Indian tribes during this period. Georgia even attempted to negotiate a treaty with the tribes. These states predicated their assertions of state authority on the claim that the Indian tribes within their boundaries were "members" of the state, and therefore subject to state, not federal authority.[42]

State assertions of political and economic authority over independent Indian tribes met with substantial resistance from the nationalists during this period. James Madison, who was later the moving force in proposing the Indian Commerce Clause, disputed the state claims to authority over the independent Indian tribes in a letter to James

42. Evidence of the basis for the state's assertion of authority over certain Indian tribes is found in a treaty of November 12, 1785 between a rump delegation of the Creeks and the State of Georgia, negotiated after federal treaty commissioners present at the same treaty conference ended their deliberatings due to insufficient tribal participation. 1 AMERICAN STATE PAPERS; INDIAN AFFAIRS, 16-17 (1832). Article I of this treaty provides, "[t]he said Indians, for themselves and all the tribes or towns within their respective nations, within the limits of the State of Georgia, have been, and now are, members of the State of Georgia." *Id.* at 17. The provision was apparently added at Georgia's insistence.



Monroe dated November 27, 1784:

> The federal articles give Congs. the exclusive right of managing all affairs with the Indians not members of any State, under a proviso, that the Legislative authority of the State within its own limits be not violated. By Indian[s] not members of a State, must be meant those, I conceive who do not live within the body of the Society, or whose Persons or property form no object of its laws. In the case of Indians, this description, the only restraint of Congress, is imposed by the Legislative authority of the State. If this proviso be taken in its full latitude, it must destroy the authority of Congress altogether, since no act of Congs. within the limits of a State can be conceived which will not in some way or another encroach on the authority [of the] States. In order then to give some meaning to both parts of the sentence, as a known rule of interpretation requires, we must restrain this proviso to some particular view of the parties. What was this view? My answer is that it was to save the States their right of preemption of lands from the Indians.

8 PAPERS OF JAMES MADISON, 156-57 (1973). In a similar vein the various treaties negotiated at Hopewell with the Cherokees, Choctaw, and Chicksaw, in 1785 and 1786 provided that "the United States in Congress assembled, shall have the sole and exclusive right of regulating trade" with the tribes. Treaty with the Cherokee, Art. IX, 7 Stat. 20; Treaty with the Choctaw, Art. VIII, 7 Stat. 22; Treaty with the Chickasaw, Art. VIII, 7 Stat. 25. The treaties guaranteed the tribes continued occupancy of land located in North and South Carolina and Georgia, and reflected a federal disposition to treat political and economic affairs with tribes located within the states as matters exclusively committed to national control under the Articles of Confederation.

The competing assertions of state authority over Indian affairs caused a serious deterioration of relations with the

Indian tribes during 1786 and 1787. *See* 30 JOURNALS OF THE CONTINENTAL CONGRESS 372-74 (hereinafter "J. CONT. CONG."), 32 J. CONT. CONG. 365-69, 34 J. CONT. CONG. 182-83. The potential for Indian war had seriously escalated in Georgia and North Carolina as a result of unsuccessful state efforts to manage Indian affairs on their own. In response to these problems, Secretary of War Knox reported to Congress on July 18, 1787, just months before the adoption of the Indian Commerce Clause, that a national solution to the Indian affairs problem was necessary. 32 J. CONT. CONG. 365-69. He noted, however, that state claims of authority under the Indian Affairs Clause of the Articles made such a national solution difficult:

> The power given by the Confederation, to the United States "of regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated" is perhaps, too inexplicit to be applied as a remedy in the present case. The Creeks are an independent tribe, and cannot with propriety be said to be members of the State of Georgia, yet the said State exercises legislative jurisdiction over the territory in dispute.

*Id.* at 366-67. Among Secretary Knox's solutions to these problems was "[s]uch an explanation by Congress, of the before mentioned part of the Confederation, as would enable the United States to regulate the necessary boundaries for the independent tribes of Indians, notwithstanding that they might be comprehended within the limits of any State." *Id.*

Echoing Secretary Knox's remarks, a committee of the Continental Congress reported in August 1787, recommending the complete and undivided federal control over the political and economic relations with the tribes. Committee Report, 33 JOURNALS OF CONGRESS 454 *et seq.* (Aug. 3, 1787). The Committee Report is absolutely indispensable to an understanding of the meaning attached to the Indian Commerce Clause by the drafters of the Constitution.



The Report noted that certain encroachments had been made on the land of the Creek and Cherokee Nations by the people of the States of Georgia and North Carolina and that no regular trade had developed between our citizens and those Nations. *Id.* at 455. The Committee noted that the problems were so serious that the Creeks might be contemplating war against the inhabitants of Georgia, and recommended a serious inquiry by Congress. *Id.* at 456. The Report stated that justice and policy required that the paramount purpose of Congress ought to be "promoting peace and free trade between them and the Indians," *id.*, and noted that the Tribes themselves complained that they suffered from lack of trade and might seek trade with Florida, then under Spanish dominion, if the trade were not promoted. The Report concluded that the complaints of the Tribes were not without just cause:

> An avaricious disposition in some of our people to acquire large tracts of land and often by unfair means, appears to be the principle source of difficulties with the Indians.

*Id.* at 457.

Most importantly, the Committee concluded the greatest difficulties arose because of misunderstandings concerning the meaning of Article IX of the Articles of Confederation:

> [B]ut there is another circumstance far more embarrassing, and that is the clause in the confederation relative to managing all affairs with the Indians etc. is differently construed by Congress and the two States within whose limits the said tribes and disputed lands are. The construction contended for by those States, if

> right, appears to the committee, to leave the federal powers, in this case, a mere nullity; and to make it totally uncertain on what principle Congress is to interfere between them and the said tribes; The States not only contend for this construction, but have actually pursued measures in conformity to it. North Carolina has undertaken to assign land to the Cherokees, and Georgia has proceeded to treat with the Creeks concerning peace, lands, and the objects, usually the principal ones in almost every treaty with the Indians. This construction appears to the Committee not only to be productive of confusion, disputes and embarrassment in managing affairs with the Independent tribes within the limits of the States, but by no means the true one.

*Id.* at 457-58.

The Committee noted that it was accepted that the tribes had just claims to the lands occupied by them and not fairly purchased from them, and that the general focus of the management of Indian affairs had been on the making of war and peace, purchasing certain tracts of lands, fixing the boundaries between them and the people of the colonies, and preventing the latter from settling on the lands left in the possession of the tribes. The Committee observed:

> *The powers necessary to these objects appear to the Committee to be indivisible,* and that the parties to the confederation must have intended to give them entire to the Union, or to have given them entire to the State; these powers before the Revolution were possessed by the King, and exercised by him nor did they interfere with the legislative right of the colony within its limits; this distinction which was then and may be now taken, may perhaps serve to explain the proviso, part of the recited clause. *The laws of the State can have no effect upon a tribe of Indians or their lands within the limits of the State so long as that tribe is independent, and not a member of the State,* yet the laws of the State may be executed upon debtors, crim-



> inals and other proper objects of those laws in all parts of it, and therefore the Union may make stipulations with any such tribe, secure it the enjoyment of all or parts of its lands without infringing upon the legislative right in question. It cannot be supposed the State has the powers mentioned without making the recited clause useless, and without absurdity in theory as well as in practice; *for the Indian tribes are justly considered the common friends or enemies of the United States, and no particular State can have an exclusive interest in the management of Affairs with any of the Tribes, except in some uncommon cases.*

*Id.* at 458-59. (emphasis added)

The Committee observed that there were but two solutions to the problem. One was for the States to make liberal cessions of territory to the United States,

> the other is for those States to accede to Congress's managing exclusively, all affairs with the Cherokees, Creeks, and other independent tribes within the limits of the said States, so that Congress in either case may have the acknowledged power of regulating trade, and making treaties with those tribes, and of preventing on their lands, the intrusions of the white people.

*Id.* at 460. Subsequent events reveal that the Framers settled upon a constitutional solution.

It should be emphasized that the focus of the Committee's primary concern was not on relations between the states and the Indians in general, but rather on the problems that arose when a state attempted to govern relations with the *tribes.* The Committee emphasized that national "Indian policy" had been directed toward such items as the making of war and peace, the purchasing of the tribal lands, and the fixing of boundaries between the tribes and the state governments, and other matters constituting political relations, *id.* at 458-59; the focus of the Committee's concern, therefore, was not directed at trade with Indians generi-

cally, but rather at state interference with the *political relations* between the *tribes* and the national government.

The problems caused by state incursions into federal prerogatives were, of course, a paramount concern of the drafters of the Constitution. James Madison stated in his introduction to the debates in the Constitutional Convention, J. MADISON, 1 JOURNAL OF THE FEDERAL CONVENTION 47 (E. H. Scott Ed. 1894):

> *In other cases the Federal authority was violated by treaties and war with the Indians, as by Georgia;* by troops raised and kept without the consent of Congress, as by Massachusetts; by compacts without the consent of Congress, as between Pennsylvania and New Jersey, and between Virginia and Maryland.

(emphasis added) Similarly, in a June 19, 1787 debate, Madison responded to a defender of the Articles of Confederation as follows:

> Will it prevent encroachments on the Federal authority? A tendency to such encroachments has been sufficiently exemplified among ourselves, as well as in every other confederated republic, ancient and modern. *By the Federal Articles, transactions with Indians appertain to Congress, yet in several instances the States have entered into treaties and wars with them.* In like manner, no two or more States can form among themselves any treaties, etc. without the consent of Congress: yet Virginia and Maryland, in one instance, Pennsylvania and New Jersey, in another, have entered into compacts without previous application or subsequent apology.

*Id.* at 190. (emphasis added)

In the Convention, on August 18, 1787, fifteen days after the Committee Report, James Madison suggested that Congress be given the power

> [t]o regulate affairs with the Indians, as well within as without the limits of the United States.



J. MADISON, 2 JOURNAL OF THE CONSTITUTIONAL CONVENTION 549 (E.H. Scott Ed. 1894.) On September 4, 1787, one month after the Committee Report, the final language of the Indian Commerce Clause, as it now appears in the Constitution, emerged from Committee. *Id.* at 654. It provides simply:

> Congress shall have power . . . To regulate Commerce . . . with the Indian Tribes . . . .

For present purposes, there are four significant changes from the language of the Articles to that of the corresponding section of the Constitution. First, the reference to "Indians" in the Articles was changed to "Indian Tribes" in the Constitution; second, the phrase "Indians *not members of any of the states*" was deleted; third, the Articles' proviso that "the legislative right of any state within its own limits be not infringed or violated" was deleted in the Constitution; fourth, the Indian Commerce Clause was juxtaposed with the Interstate and Foreign Commerce Clauses.[43]

That the problems arising from the disputed interpretation of the Articles of Confederation led directly to the Constitution's Indian Commerce Clause is indisputable. James Madison, in defending the language of the Indian Commerce Clause in THE FEDERALIST stated:

> The regulations of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the states,

43. In the Articles, on the other hand, Congress was given no control of Interstate Commerce and, although certain aspects of foreign relations were reserved to the Congress, there was no equivalent to the Foreign Commerce Clause. This juxtaposition suggests that Indian commerce shares with foreign and interstate commerce certain core protections from state discrimination. *See* Section IV, *infra*.

> and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of Confederation have inconsiderately endeavored to accomplish impossibilities, to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.

J. MADISON, THE FEDERALIST No. 42 (January 22, 1788) at 290 (Central Law Journal Ed. 1917).

Nationalization of relations with the tribes could not have been regarded as a radical change. As noted above, the Crown had previously attempted to exercise all powers governing the relation with the tribes to the exclusion of the colonial governments, and the English thought that problems with relations with the tribes had developed because of "local interfering of particular Provinces."[44] Further, the majority on the Committee believed that the proper interpretation of the Articles of Confederation would hold that governance of political relations with the tribes belonged exclusively to the national government and not the states, notwithstanding the ambiguous qualifying phrase.

Construed against the backdrop of the Articles of Confederation and the Committee's pointed rejection of Georgia's attempt to regulate relations with the Indian tribes, the Indian Commerce Clause at a minimum amounts to

44. 7 N.Y. COL. DOC. 634-36, 637-41, note 41, *supra*.



a federalization of the relations with the *tribes* to the exclusion of the states. Whatever negative constitutional implications may exist from the Clause as to the power of the states over *individual* Indians, *cf. Moe,* 425 U.S. 481 n. 17, the incorporation of the word "Tribes" into the Clause, coupled with the repeated reference to the "independent tribes" in the Committee Report (with its concomitant recognition of the tribes as political entities capable of making policy with the United States), indicates that the Clause negates any power in the state to determine, independent of federal authority, the relations with the tribes themselves. As the Report noted:

> [W]hatever may be the true construction of the recited clause [of the Articles of Confederation], the Committee are persuaded that it must be impracticable to manage Affairs with the Indians within the limits of the two States, so long as they adhere to the opinions and measures they seem to have adopted.

Committee Report at 459-60. Other than a cession of territory to the United States, which would itself remove the jurisdiction of the States, the only solution was

> for those States to accede to Congress's managing, *exclusively* all affairs with the Cherokees, Creeks, and other independent Tribes within the limits of said states . . .

*Id.* at 460. (emphasis added)

The constitutional provision granting Congress power to regulate "Commerce with the Indian Tribes," therefore, gives implicit recognition to the sovereign, though dependent, status of the tribes, and declares that the federal government, not the states, shall govern their relations. *See also Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832).[45]

45. Not only is Justice Marshall's holding in *Worcester* tied to the nega-
[Footnote continued on page 82]

The governmental status of Indian tribes also receives constitutional recognition in the Supremacy Clause, Article VI of the Constitution, which provides in part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .* (emphasis added)

As Justice Marshall suggests in *Worcester*, the express recognition in the Constitution of the supremacy of treaties previously made stands as an implicit recognition of the sovereign status of the tribes because the United States had entered into treaties with the tribes after the commencement of the Revolutionary War but before the Constitution was ratified. Referring to the treaty executed between the United States and the Cherokee Nation at Hopewell on November 28, 1778, he stated:

> The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The word "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense.

31 U.S. (6 Pet.) at 559.

The analysis presented in this section strongly supports the conclusion that the Indian Commerce Clause is distinct in meaning and scope from the Interstate Commerce Clause. This is by no means an anomalous suggestion, for in *Japan Line, Ltd. v. County of Los Angeles*, .... U.S. ...., 60 L. Ed. 336, 346 (1979), this Court recently held that a "more extensive constitutional inquiry" is required where a state seeks to tax foreign, as opposed to interstate commerce. The Indian Commerce Clause has similar attributes.

Felix Cohen notes that the Indian Commerce Clause power is "much broader than the power over commerce between states" because it comprehends aspects of intercourse which have had little or no relation to commerce. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 91, 92 (G.P.O. 1941).[46]

Moreover, the Indian Commerce Clause has a completely different focus than the Interstate Commerce Clause. As this Court recently stated in *Hughes v. State of Oklahoma*, .... U.S. ...., 60 L. Ed. 2d 250, 255 (1979), the Interstate Commerce Clause was designed to "avoid the tendencies toward economic Balkanization that plagued relations among the Colonies and later among the States under the Articles of Confederation." It is directed at economic, not political relations between the states.

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tive implications of the Commerce Clause, *see* Section III B *infra*, but the opinion sets out some of the history outlined above and refers specifically to the Committee Report and the problems concerning the Articles. 31 U.S. (6 Pet.) at 558-59.

46. *See also* Able, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941), relied upon by this Court in *Japan Line, supra*, where the author concluded that regulation of commerce in connection with transactions with Indians was "so distinct and specialized a subject as to afford no basis for argument as to the meaning of the rest of the clause." *Id.* at 468. He noted that "Indian trade was a special subject with a definite content, which had been within the jurisdiction of Congress under the Articles of Confederation" and "thus derived from a totally different branch of the Randolph outline than did the control over foreign and interstate commerce." *Id.* at 467. The author also noted that the provision regarding commerce with the tribes emerged in a different time in the Constitutional Convention than did the provisions regarding commerce with foreign nations and among the several states and was not added to the formal clause until September 4, 1787.

Regulation of Indian commerce, on the other hand, has historically involved regulation of the *political* relationships with entities whose attributes of sovereignty in many ways resemble those of foreign nations. The Framers clearly recognized that these political relationships were appropriately the exclusive province of the federal government, as were foreign relations. Non-uniform state regulations and taxation in the area of Indian commerce will tend to disrupt federal purposes and policies no less than in the area of foreign commerce. *Cf. Japan Line Ltd.*, .... U.S. ...., 60 L. Ed. 2d at 350 (1979).

Imposition of the state tax here is unconstitutional not only because it interferes with the ability of the Tribes to carry out governmental functions, but also because it would actually be destructive of the commerce now regulated by the Tribes. The impact of the imposition of the state taxes would be visited directly upon the intercourse of the Tribes which is, by the Indian Commerce Clause, constitutionally vested exclusively in the United States.

Interference with the trade, governments, and economies of the Tribes however, is only half of the constitutional equation. Imposition of the state tax would also interfere directly with the prerogatives of the United States. The purpose of the Indian Commerce Clause was to vest exclusively in the United States the ability to control the political and economic relations with the tribes. Under our Constitution, it is for the United States, not the State, to determine what restraints shall be imposed upon trade with the tribes, and how that trade shall be utilized to promote the policies of the United States. The state excise tax, because of its profound impact upon the economy and political structure of the Tribes and their ability to function,



interferes fundamentally with the options of the federal government in executing Indian policy.

Further, Congress and the Executive Branch have not remained idle. Instead, they have moved a great distance down the constitutionally prepared avenue in governing the relations of the tribes. As discussed in detail in Section III C, *infra*, Congress, through the Indian Reorganization Act, the Indian Self-Determination and Education Assistance Act, and other statutes, has specifically determined that it will pursue a policy of promoting tribal self-government and self-determination in execution of its constitutional responsibility. Pursuant to its powers under the Constitution, and in implementation of the Indian Reorganization Act and other federal statutes promoting the exercise of tribal government, the United States has specifically approved the Constitutions and taxing ordinances of the Appellee Tribes. When considered against the constitutional backdrop of federal authority over relations with the Tribes, it is manifest that imposition of the state tax would result in a fundamental interference with congressional enactments, executive functions and federal policies. *See* Section III C, *infra*.

**B. The decisions of this Court recognize the negative implications of the Indian Commerce Clause especially in situations involving essential tribal relations. *Moe v. Confederated Salish and Kootenai Tribes* does not preclude consideration of this constitutional preemption of state statutes which interfere with tribal sovereignty or discriminate against Indian commerce.**

The decisions of this Court have long recognized the preemptive effect of the Indian Commerce Clause over state attempts to regulate the essential economic and political relations of the tribes. The Tribes' analysis is supported

by these cases. In *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832), the Court explicitly declared unconstitutional laws of the State of Georgia which infringed on the tribal sovereignty of the Cherokee Nation. Chief Justice Marshall stated:

> [T]he said laws of Georgia are unconstitutional and void, because they interfere with, and attempt to regulate and control the intercourse with the said Cherokee nation, which, by the said Constitution, belongs exclusively to the Congress of the United States. . . .

*Id.* at 540. While the broadest reaches of Chief Justice Marshall's opinion in *Worcester,* suggesting an automatic and absolute exclusion of state law in Indian country,[47] have been qualified by later cases, the strict holding of the case was clearly predicated on the negative implications of the Indian Commerce Clause. This holding, as discussed below, was reaffirmed by the Court in *Williams* and *McClanahan.*

Similarly, in *The Kansas Indians,* 72 U.S. (5 Wall.) 737 (1867), this Court effectively held that state efforts to impose a land tax on reservation Indians were preempted:

> If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing then they are a "people distinct from others," capable of making treaties, separated from the jurisdiction of Kansas, and to be *governed exclusively* by the government of the Union. If under the control of Congress, from necessity there can be no divided authority.

*Id.* at 755. (emphasis added)

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47. Justice Marshall stated:

> The Cherokee nation . . . is a distinct community occupying its own territory . . . in which the laws of Georgia can have *no* force. . . . .

31 U.S. (6 Pet.) at 561. (emphasis added)



In *Williams v. Lee,* 358 U.S. 217 (1959), the Court preserved the preemptive effect of the Commerce Clause as interpreted in *Worcester,* at least in cases where tribal self-government was involved:

> Over the years this Court has modified these principles in cases *where essential tribal relations were not involved* and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained.

358 U.S. at 219. (emphasis added) After referring to various cases in which state law had been allowed to apply in the absence of any tribal involvement, the Court stated:

> Essentially, *absent governing Acts of Congress,* the question has always been whether the state action infringed on the right of reservation Indians to make their laws and be ruled by them.

358 U.S. at 220. (emphasis added) Not only did the Court specifically uphold the *Worcester* preemption test, but the emphasized phrase, "absent governing Acts of Congress," strongly suggests a constitutionally-based preemption.

*McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973), is to the same effect. After noting that the broader reaches of *Worcester,* which it termed the "Indian sovereignty doctrine," had imposed a jurisdictional limit of the reach of state law on Indian reservations, the Court quoted the *Williams* language that this principle had been modified only in cases "where essential tribal relations were *not* involved . . ." 411 U.S. at 171. (emphasis added)

The State argues, however, that any inquiry into the "negative implications" of the Indian Commerce Clause is barred by *Moe*:

> It is *now* clear, after *Moe* that the Clause is solely a source of Congressional authority which creates no

> automatic bar to State tax law, at least so far as on-reservation application of that law is concerned.

State Br. at 39.[48] The State's reference is to footnote 17 of this Court's Opinion in *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463, 481 n. 17 (1976).[49] To read the Court's language, however, as holding that the Commerce Clause imposes no restrictions whatsoever on state taxation of Indian commerce is unwarranted. In the text of its opinion immediately preceding the footnote, this Court stated:

> [T]he cigarette sales tax, as applied to *on-reservation sales by Indians to Indians*, conflict[s] with the congressional statutes which provide the basis for decision with respect to such impositions.

425 U.S. at 480-81. (emphasis added) (Citing *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)).

In its footnote, the Court stated:

> It is thus clear that the basis for the invalidity of these taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause, U.S. Const., Art. VI, cl 2, and not any *automatic exemptions* as a matter of constitutional law either under the Commerce Clause or the intergovernmental-immunity doctrine. . . .

425 U.S. at 481 n. 17. (emphasis added)

The issue before the Court in *Moe* was the validity of the state sales tax, "as applied to on-reservation sales by

48. It does concede, however, sufficient substantiality to the issue to give the three judge court jurisdiction pursuant to 28 U.S.C. §2281. *Id.*

49. The District Court relied on the same footnote in *Moe* for its conclusion that

> [a] full review of [the Tribes' arguments] is, however, unnecessary. The simple answer is that such claims have been prohibited by the Supreme Court.

446 F. Supp. at 1356, J.S. App. at 25.



Indians to Indians." 425 U.S. at 480. Both *McClanahan* and *Mescalero Apache*, relied upon by the Court for its statement that there was no "automatic exemption" under the Indian Commerce Clause, also dealt with imposition of state taxation on reservation Indians. Neither *Moe*, *McClanahan* nor *Mescalero* involved any interference with tribal self-government nor any discrimination against Indian commerce.[50]

The key to the correct interpretation of the Court's language is its declaration that there are no *"automatic exemptions." McClanahan, Mescalero Apache* and *Moe* hold that the validity of a state tax against Indians which neither interferes with tribal self-government nor discriminates against Indian commerce will be judged by whether it conflicts with the statutes and treaties affecting the tribe and not by any "automatic" constitutional exemption. The Court did *not* hold, on the other hand, that the Indian Commerce Clause places no restrictions on state action affecting Indian commerce which discriminates or interferes with tribal sovereignty.

Thus, in *McClanahan*, this Court held that the broadest reaches of the "Indian sovereignty doctrine," as articulated by Justice Marshall in *Worcester*, were no longer generally relied upon by the Court as dispositive principles. Marshall had held that state law could have no play whatsoever within the geographic limits of an Indian reservation. 411 U.S. at 168. Indian sovereignty operated, in short, as an

50. *Moe* cannot be gratuitously extended therefore to situations where such problems are presented. Nor did *Moe* qualify the language of *Williams* that *"absent governing Acts of Congress*, the question has always been whether the state action infringed on the right of reservation Indians to make their laws and be ruled by them." 358 U.S. at 220. The *Williams* test, as noted earlier, suggests a preemptive effect to the Clause.

"automatic exemption." Rather than apply such a blanket exemption, the Court stated in *McClanahan* that it would

> look . . . to the applicable treaties and statutes which define the limits of State power.

411 U.S. at 172.

But, as noted above, *McClanahan* confirmed that the *Worcester* preemption principle has been modified only "in cases where essential tribal relations were *not* involved and where the rights of Indians would not be jeopardized. . . ." *Id.* at 171-73 citing *Williams v. Lee*, 358 U.S. 217, 219-220 (1959). *McClanahan*, and derivatively *Moe* since it relied on the *McClanahan* analysis, did not qualify the utility of the preemption analysis presented here, for cases in which "essential tribal relations" *are* involved.[51]

**C. The relevant federal statutes, particularly when read against the constitutional federalization of essential tribal relations implicit in the Indian Commerce Clause, preempt imposition of the state excise tax on tribally taxed and operated enterprises.**

**1. *The relevant federal statutes were designed to promote tribal self-government and economic self-sufficiency.***

The recent cases of this Court consistently recognize that a principle focus of contemporary federal policy is upon

51. *McClanahan* does suggest that statutory and treaty preemption are preferred grounds of decision and the Court will reach the constitutional issues only if it finds no preemptive conflicts between state legislation and federal statutes or treaties. 411 U.S. at 172 n. 8:

> The extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question . . . The question is generally of little more than theoretical importance, however, since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction.

*See generally, Note, Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).



strengthening tribal self-government.[52] In *Fisher v. District Court*, 424 U.S. 381 (1976), the Court described §16 of the Indian Reorganization Act, 25 U.S.C. §476 as

> a statute specifically intended to encourage Indian tribes to revitalize their self-government.

In *Bryan v. Itasca County*, 426 U.S. 373, 389, n. 14 (1976), this Court noted that

> Present federal policy appears to be returning to a focus upon strenthening tribal self-government, *see, e.g.*, Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. §§1451, *et. seq.* and the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. §§450, *et seq.*[53]

52. This policy is not new in origin. As Justice Marshall observed in *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 556-57:

> From the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries within which their authority is exclusive, and having a right to all lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

The Trade and Intercourse Act of 1790, 1 Stat. 137, "[a]n Act to regulate trade and intercourse with Indian tribes," provided, for example, that no sale of lands made by any Indians would be valid unless made by public treaty with the tribe, *id.* at §4, clearly recognizing the nationhood and political authority of the tribes over their land.

In a similar vein, the report of a committee of the House of Representatives, in explanation of a provision of an 1834 statute which provided for annuity payments to the chiefs of the respective tribes, stated:

> The payments are required by the terms of the treaties, to be paid to the tribe as a political body capable of acting as a nation . . . . The payment to the Chiefs is a mode simple and certain . . . [to enable the tribe] to apply them to the expenses of their government, to the purpose of education, or to some object of general concern.

H. Rept. 474, 23rd Cong., 1st Sess. May 20, 1834 at 2-3, cited in F. COHEN, FEDERAL INDIAN LAW at 107-08 (1966 ed.).

53. In *Bryan*, this Court observed that even in periods of our history when Congress has moved toward a policy of assimilating Indians into the dominant culture, Congress has been judicious in its continued protection of tribal self-government. Holding that Public Law 83-280 did not confer

[Footnote continued on page 92]

In *Santa Clara Pueblo v. Martinez*, 436 U.S. at 62, the Court noted that one of the purposes of the Indian Civil Rights Act of 1968 was to "promote the well-established 'federal policy of furthering Indian self-determination.'" *See also Morton v. Mancari*, 417 U.S. 535, 551 (1974); *Fisher v. District Court*, 424 U.S. at 391.

And, as noted in Section II, *supra*, the Court in *Williams v. Lee*, 358 U.S. at 221 (1959), recognized that the provisions of the various treaties setting aside reservations for the permanent home of the Indians implicitly confirmed the governmental authority of the tribes over their reservations.

The statutes most critical for this preemption analysis have been discussed above in Section I B in support of the conclusion that Congress has ratified tribal power to tax non-Indians involved in transactions with Indians on the reservations.

Of central importance is the Indian Reorganization Act of 1934. The Act was designed in part "to grant certain rights of home rule to Indians," 48 Stat. at 984. *See generally, Comment, Tribal Self-Government and the Indian Reorganization Act* of 1934, 70 MICH. L. REV. 955 (1972). Section 16 of the Act, 25 U.S.C. §476, implemented that design by confirming in the tribes "all powers vested by existing law." As has been noted, before it passed the Act, Congress had been specifically advised by Commissioner Collier of *Buster v. Wright's* holding that tribes had power to tax non-Indians. The contemporaneous opinion of the Solicitor for the Department of the Interior, issued at the request of Congress, noted that among those powers vested by existing law is the power of levying taxes against non-Indians. Solicitor's Opinion, 55 I.D. at 46. And, as was pointed out, the Secretary of the Interior has approved the assertions of taxing jurisdiction over non-Indians in the Constitutions and ordinances of each of the three Appellee Tribes.[54]

The Indian Civil Rights Act of 1968, 25 U.S.C. §1301 *et. seq.* has a similar focus. *See Santa Clara Pueblo v. Martinez,*

taxing jurisdiction on the states, the Court noted that the omission of any specific reference to taxing jurisdiction was highly significant because "mention would normally be expected if such a sweeping change in the status of tribal government . . . had been contemplated by Congress." 426 U.S. at 381. The Court also noted that there was nothing in the legislative history to suggest that

> Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private voluntary organizations,' *United States v. Mazurie*, 419 U.S. 544, 577 (1975)—a possible result if tribal governments and reservation Indians were subjected to the full panoply of civil regulatory powers, including taxation, of state and local governments.

426 U.S. at 388. The Court noted that there was no grant of state jurisdiction over the tribes themselves in the statute, and that the statute contemplated the continuing vitality of tribal government. 426 U.S. at 389.

54. While the Makah Indian Tribe is organized pursuant to §16 of the Indian Reorganization Act, the Colville Confederated Tribes and the Lummi Indian Tribe voted not to come under the provisions of the Act. This should make no difference for purposes of this preemption analysis, however, since Congress has not distinguished between IRA and non-IRA tribes in implementing federal Indian policy in the years since the IRA's enactment. The definitional section, for example, of the Indian Civil Rights Act of 1968, 25 U.S.C. §1301, regarding "Indian tribes" is typical. Under the statute "Indian tribe" is defined as any tribe, band or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government." Even more specifically, Congress enacted an amendment in 1935 to the Indian Reorganization Act, 49 Stat. 378, 25 U.S.C. §478b, designed to foreclose separate legal treatment for IRA and non-IRA tribes:

> All laws, general and special, and all treaty provisions affecting any Indian reservations which has voted or may vote to exclude itself from the application of [the Indian Reorganization Act] shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said sections.

The statute provides that all applicable treaties and statutes also apply to tribes electing to come under the Act.

436 U.S. 49, 62 (1978), and the discussion in Section I B, *supra*, at 27.

The Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. §450, contains a congressional declaration of policy to "respond to the strong expression of the Indian people for self-determination" and to establish a "meaningful Indian self-determination policy," 25 U.S.C. §450a, and sets forth an express finding that "the Indian people will never surrender their desire to control their relationships, both among themselves and with non-Indian governments, organizations and persons." 25 U.S.C. §450(a). The Act provides that Congress is to implement this policy largely by contracting with the tribes for performance of certain governmental functions previously performed by the Bureau of Indian Affairs to the tribes. *See* 25 U.S.C. §§450f-m.[55] In addition, numerous federal statutes recognize the general governmental authority of the tribes over such matters as air pollution, mining on the reservations, urban and rural planning, housing, solid waste disposal and pollution prevention; and some statutes specifically contemplate exercise of tribal governmental authority over non-Indians. *See* Section I B, *supra*.

One final statute deserves emphasis—the Federal Cigarette Racketeering Act, enacted on November 2, 1978, P.L. 95-575, 92 Stat. 2463. The Act makes it a federal crime to knowingly ship, transport, receive, possess, sell, or purchase any quantity of cigarettes in excess of 60,000 "which bear no evidence of payment of applicable state cigarette taxes in the state where such cigarettes are found." The

55. *See also* 25 U.S.C. §2010, 92 Stat. 2321, enacted in 1978 which, in effect, establishes a self-determination policy for Indian education:

> It shall be the policy of the Bureau, in carrying out the functions of the Bureau, to facilitate Indian control of Indian affairs in all matters relating to education.



legislative history contains an express disclaimer of any intention to affect the existing exemption of reservation cigarette enterprises from the collection of state cigarette excise taxes. The Conference Report on the Act states:

> Some concern was expressed in the course of the conference that the definition of "contraband cigarettes" inadvertently extinguished rights of certain Indians and Indian tribes under current law to engage in commercial sale of cigarettes in Indian country free of State taxation. The phrase "applicable State cigarette taxes" makes it clear that this legislation is not intended to affect transportation or sale by Indians or Indian tribes acting in accordance with legally established rights.
>
> The conferees do not intend that this bill address the current exemption from state taxation of cigarette sales on Indian reservations and nothing in this bill is intended to affect this or any other immunity from state tax held by any Indian or Indian tribe. Similarly, other commercial cigarette sales exempted by law from state taxation (for example, military post exchanges) are not affected by this legislation.

H. Conf. Rept. No. 74-1778 at 9 n. 1. 12B U.S. Code Cong. and Admin. News 7026, 7046, 95th Cong. 2d Sess. In the face of the dispute concerning the application of state taxes in circumstances such as these, Congress took special care to avoid interfering with tribal self-government and economic development.

In addition, the promotion of tribal economic self-sufficiency and development is a powerful theme in contemporary congressional policy and is reflected in a whole series of congressional enactments dealing with Indian tribes.[56] For example, in the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. §1451, et. seq., Congress declared to be its poli-

56. *See generally*, Task Force 7, Report on Reservation and Resource Development and Protection, Final Report to the American Indian Policy Review Commission, 87 et. seq. (1976).

cy to "help develop and utilize Indian resources, both physical and human, to a point where Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." 25 U.S.C. §1451. Similarly, the Comprehensive Employment Training Act of 1973 set up special Indian manpower programs designed to alleviate employment problems on Indian reservations where they were particularly acute.[57]

The Public Works and Economic Development Act of 1965, 79 Stat. 552, 42 U.S.C. 3121, et seq., reflects concern expressed by Congress that Indian areas receive special assistance. Indian tribes are eligible for Title I grants for public works and development facilities and special provision is made for supplemental grants to Indian tribes in excess of that available to non-Indian communities. 42 U.S.C. §3131(c). In addition, special provision is made under Titles II and III of the Act for other financial and technical assistance specially addressed to Indian tribes. 42 U.S.C. §§3142(b)(9)(B), 3151(b), 3161(a)(3); *see* Task Force 7 at 152.[58]

57. 92 Stat. 1962, 29 U.S.C. §872. At least 4.5% of funds authorized under the Act are to be allocated for expenditures to aid economic development of Indian communities. 29 U.S.C. §872(g).

58. The Economic Development Administration has established an Indian desk as an administrative department within the agency. The agency has formulated a special Indian development program whose general objective is "to assist Indians in taking effective steps, compatible with the Indian cultural heritage, to achieve stable local economics and economic growth, new long-term employment opportunities and improved local conditions." Task Force 7 at 154-55.

For further discussion of programs implementing the congressional policy of encouraging economic self-sufficiency, *see generally*, Toward Economic Development For Native American Communities, Joint Committee Print, Joint Economic Committee (91st Cong. 1st Sess.) Vol. 2, Part II (1969).



Similarly, a 1962 amendment to the Public Works or Facilities Act of 1955, P.L. 87-808, made specific findings that Indian tribes were "unable to raise the necessary funds at reasonable rates" for essential public works and facilities, 42 U.S.C. §1491, and made them eligible for a grant and loan program.

Congressional policy promoting economic self-sufficiency goes back several decades although the policy has obviously not been completely successful. Section 10 of the Indian Reorganization Act set up a revolving loan fund "for the purpose of promoting the economic development of such tribes and of their members." 25 U.S.C. §470. The legislative history of the Indian Reorganization Act also evidences a general federal purpose to promote Indian economic development and self-sufficiency.[59]

Further, the policy is implicit in the treaties, statutes and executive orders setting up the reservations themselves. One of the fundamental purposes of the United States in setting aside the reservations was to create for the tribes a homeland in which they could become economically self-sufficient. In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), the Court stated that the creation of the reservation for the Metlakatla Indians was designed to "encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life." *Id.* at 89. *Cf. Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 600 et. seq. (1963).

59. *See e.g.*, Hearings Before the House Comm. on Indian Affairs on H.R. 7902 (73rd Cong 2d Sess.) 24-25 (Commissioner Collier's explanatory memorandum); Hearing Before the Committee on Indian Affairs, United States Senate on S. 2755 and S. 3645 (73rd Cong. 2d Sess.) 112-13 (testimony of Mr. Fredenberg concerning Menominee timber operations), 140, 152 (testimony of Ward Shephard).

Congress has grappled with the problem of economic dependency of Indian tribes for a century or more. The strengthening of tribal government has been the means chosen by Congress for attainment of the goal of self-sufficiency. Quite clearly, imposition of the state excise tax is in conflict with these federal policies. That conflict is resolved by application of the principle of federal preemption.

**2. *The scope of the federal preemption of state statutes depends on the nature and extent of the respective interests of the state and national governments in the subject matter.***

Congressional statutes which do not expressly preempt state legislation in the field nevertheless override state laws with which they conflict by virtue of the provisions of the Supremacy Clause, United States Constitution, Art. VI. The test was recently stated by this Court as follows:

> The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is 'to determine whether, under the circumstances of this particular case [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'

*Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977), citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). As the Court elaborated,

> [t]his inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.

430 U.S. at 526.

The preemption decisions of the Court cover a broad variety of subjects and a whole range of conflicts ranging from direct violations of federal law to conflicts by implication. It is not surprising, therefore, that this Court has adopted a flexible approach to preemption problems designed to take account of various levels of conflict, and various degrees of state and federal interest. In *Hines v. Davidowitz*, Justice Black observed:



> This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.

312 U.S. at 67.

State statutes have been held preempted both because they are in "actual conflict" with federal law and also because of "federal occupation of the field" absent any specific conflict. The range of possible situations in each category, however, is very large and includes both direct conflicts and those arising by implication. *See Clover Leaf Butter Co. v. Patterson*, 315 U.S. 148, 156 (1942).[60]

A careful examination of the Court's holdings, however, reveals that the scope of the preemption declared by the Court varies according to a number of separate factors.

60. Thus, for example, this Court has found an actual conflict in situations ranging from that in *Free v. Bland*, 369 U.S. 663 (1962), in which a Texas community property law was held directly contradictory to applicable federal treasury regulations governing the passage of a United States Savings Bond on the death of a co-owner, to more ambiguous situations in which state statutes were struck down because they were in conflict with the underlying objectives of federal statutes. *See e.g., Nash v. Florida Industrial Commission*, 389 U.S. 235, 239 (1967) (striking down a state unemployment compensation law held to be inconsistent with the provisions of the National Labor Relations Act encouraging persons to file unfair labor practice charges with the NLRB).

One important factor is the nature of the national interest in the subject matter. If the field is one which is traditionally deemed "national", the Court is much more vigilant in striking down state incursions into a subject that Congress has historically reserved to itself. As the Court stated in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), one important factor was whether "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *See e.g., Hines v. Davidowitz*, 312 U.S. 52 (1941), striking down a state statute requiring registration of aliens, in which the Court was solicitous of the paramount federal interest in matters germane to foreign affairs, and *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972), in which a state nuclear waste law was held preempted. *See also Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

On the other hand, if the activity or interest affected by the state statute is more "local" in character, the Court is much less inclined to find preemption. *See Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), holding that a municipality could enforce its smoke abatement ordinance against a federally-licensed steamship moving in interstate commerce.

The Court will also look carefully to the state statute to see what state interest is being served. The Court is much more reluctant to find preemption in areas which our constitutional system has traditionally allocated to the states. As the Court observed in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947):

> [I]n a field which the States have traditionally occupied . . . we start with the assumption that historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.



In addition, the Court has shown considerable reluctance to preempt a state's laws designed to protect the health and safety of its citizens.[61]

Finally, the cases evidence careful consideration of the effect of the presence of federal regulatory agencies in the area at issue. The Court has been careful to determine whether federal policy may be frustrated by state action that trespasses on agency prerogatives. *See, e.g., San Diego Building Trade Council v. Garmon*, 359 U.S. 236 (1959), in which the Court emphasized the fact that "Congress has entrusted administration of [national] labor policy . . . to a centralized administrative agency" and concluded that "to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purpose." 359 U.S. at 242, 244.

Consideration of these factors in the instant case strongly indicates that state laws should be given little latitude. First, as to the breadth of the federal interest, Congress has historically exercised plenary power over Indian affairs pursuant to the Indian Commerce Clause. Like its regulation of foreign commerce, federal action in Indian affairs has involved delicate relations with quasi-sovereign entities rather than the regulation of mere economic relation-

61. In *Maurer v. Hamilton*, 309 U.S. 598 (1940), a state law was upheld which forbade "cab-over-cab" trailers as unsafe even though to do so conflicted with a national statute which made it the express policy of Congress to regulate transportation by motor carriers to foster sound economic relations. *See also Comment, A Framework for Preemption Analysis*, 88 YALE LAW JOURNAL, 363 (1968); L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 376-91.

ships. Further, the states have been traditionally excluded from these relations:

> [T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history.

*Rice v. Olson*, 324 U.S. 786, 789 (1945). In this area, states have exercised jurisdiction only with the consent of Congress. *See McClanahan v. Arizona Tax Commission*, 411 U.S. at 170-171.

Further, the State is not attempting here to protect some significant interest of its citizenry such as health or safety. Instead, the only interest the State advances is its general interest in raising tax revenues, an interest which is, of course, also asserted by the Tribes. Moreover, the State's interest will be offset to the extent that the Tribes reduce the obligations of the State by providing their own programs.[62] Finally, Indian relations, like labor relations, are governed largely by a federal administrative agency, the Department of the Interior, which has specifically approved both the constitutional assertions of the Tribes' power to tax non-Indians and the tribal ordinances themselves. Imposition of the state tax on these transactions will, therefore, clearly conflict with the decisions of the Executive Branch of the United States.

Given these factors, it is not surprising that the preemptive scope of federal law in Indian affairs is quite broad. Its impact is enhanced by independent factors as well. As this Court noted in *McClanahan v. Arizona Tax*

62. In addition to these direct benefits, the tribal programs also diminish state obligations by reducing unemployment on the Reservations. Because of economic multiplier effects, any generation of economic activity on the Reservation will tend to generate other activity, which in turn will further reduce state obligations.



*Commission*, Indian preemption questions must be considered against the "backdrop" of tribal sovereignty and "the relevant treaty and statutes. . . read with this tradition of sovereignty in mind." 411 U.S. at 172 and 173. Further, in interpreting federal statutes, the courts are required to be guided by the "eminently sound and vital canon," *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n. 7 (1976), that ambiguities in legislation affecting retained tribal sovereignties are to be construed in favor of the tribes. *See Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, ..... U.S. ....., 58 L. Ed. 2d 740, 758 (1979). Finally, the federal statutes must be construed in light of the purpose and meaning of the Indian Commerce Clause to federalize the relations with the Indian tribal governments to the exclusion of the states.

Three recent decisions of this Court specifically advance the application of federal preemption doctrine in Indian affairs.[63] The most concise description of its working is found in *Bryan v. Itasca County*, 426 U.S. 373, 376 n. 2:

> The *McClanahan* principle derives from a general preemption analysis. . . that gives effect to the plenary and exclusive power of the Federal Government to deal with Indian tribes. . . and 'to regulate and protect the Indians and their property against interference even by a state,' . . . This pre-emption analysis draws support from "the 'backdrop' of the Indian sovereignty doctrine," *Moe v. Salish & Kootenai Tribes*, 425 U.S.

63. *See also Chief Seattle Prop. v. Kitsap County*, 86 Wn.2d 7, 541 P.2d 699 (1977), where the Washington Supreme Court recognized that federal preemption in Indian law may apply to invalidate a state tax even on a non-Indian:

> Furthermore, if the state tax imposed on an Indian or a non-Indian would substantially interfere with a discernable federal policy to aid the Indian, the tax would be invalid.

86 Wn.2d at 14, 541 P.2d at 705.

> 463, 475 (1976); '[t]he policy of leaving Indians free from State jurisdiction and control [which] is deeply rooted in the nation's history,' . . . and the extensive federal legislative and administrative regulation of Indian tribes and reservations. . . . 'Congress has. . . acted consisten ly upon the assumption that the states have no power to regulate the affairs of Indians on a reservation,' and therefore 'state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.'

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), the Court held that the federal treaties and statutes governing Indian affairs were to be given a pre-emptive effect notwithstanding the absence of any *specific* federal bar against the application of state jurisdiction. The Court, noting that the Navajo Treaty did not explicitly provide that the Indians were to be free from state law, stated that when read in light of the applicable canons of construction and the history of the tribal relations with the United States, the Treaty committed the reservation to the exclusive sovereignty of the Navajos subject to general federal supervision. Extension of state law—including state tax law—to Indians on the Navajo Reservation was therefore precluded. 411 U.S. at 174-76. Further, the Court ruled that congressional silence on the question of state tax jurisdiction evidenced an intent to preclude the applicability of the state tax law:

> Similarly, narrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only *if Congress assumed that the States lacked the power to impose the taxes without special authorization.*

411 U.S. at 177. (emphasis added) Notwithstanding the lack of any showing of interference with tribal self-government, the Court held the state tax preempted.



Most important of the Court's recent decisions, however, is *Fisher v. District Court*, 424 U.S. 382 (1976). In a *per curiam* opinion, the Court noted that the Northern Cheyenne Tribe, as authorized by its Constitution adopted pursuant to §16 of the Indian Reorganization Act, had established a tribal court and granted it jurisdiction over adoptions among members of the tribe. 424 U.S. at 387. Although application of state law interfered with tribal self-government within the meaning of *Williams v. Lee*, 424 U.S. at 386, the Court entered an independent holding:

> The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by §16 of the Indian Reorganization Act, 25 U.S.C. §476. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians. Accordingly, even if we assume that the Montana courts properly exercised adoption jurisdiction prior to the organization of the Tribe, a question we do not decide, *that jurisdiction has now been preempted.*

424 U.S. at 390. (emphasis added)

The Court quite clearly held that in enacting its ordinance, the Tribe was implementing an overriding federal policy favoring tribal self-government which was sufficient to *preempt* state jurisdiction. Exactly the same considerations apply in the instant case.[64]

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64. Although all the parties to the *Fisher* controversy were Indians, this does not affect its applicability to the instant case. As the Court noted:

> The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff, but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.

424 U.S. at 390. In the instant case, the Appellee Tribes, like the Northern Cheyenne Tribe, were acting to implement the overriding federal policy protecting and enhancing tribal self-government. The implementation of this policy, the Court noted in *Fisher*, preempts state law.

**3. *Imposition of the state tax will substantially interfere with congressional policies promoting Indian self-determination, strengthening tribal government, and encouraging economic self-sufficiency as implemented through the taxing ordinances of the Appellee Tribes.***

With these principles in mind, the state cigarette tax must be held preempted. The harsh practical reality is, if the state tax is applied to these tribally-taxed sales to non-Indians, the tribal enterprises and the resulting tax revenues will be eliminated. Either the state tax is preempted as inconsistent with federal law and policy as applied through the tribal ordinances, or the tribal system will be effectively preempted by the economics of the situation; the two competing systems cannot peacefully coexist.

The state law clearly interferes with the well-established federal policies designed to promote and strengthen tribal government. This result occurs not only because the state law will impose serious financial burdens on already "financially disadvantaged" tribes, *cf. Santa Clara Pueblo v. Martinez*, 436 U.S. at 64, but also because imposition of the state law will directly interfere with the comprehensive tribal regulatory program. Thus, imposition of the state tax will interfere not merely with the ability of the Tribes to continue the various governmental programs that are supported by the tax revenues, but also with the "authority of Indian governments over their reservations." *Williams v. Lee*, 358 U.S. at 223.

This interference directly contravenes federal law and policy. All of the factors which demonstrate that imposition of the state tax amounts to an interference with tribal government within the meaning of *Williams v. Lee*, Section II, *supra*, require a conclusion that the state tax



has been preempted by the federal policies designed to strengthen tribal government. Imposition of the state tax will intrude upon the Tribes' performance of essential governmental functions and will cause a forced relinquishment of important governmental activities. If state law is authorized by this Court to effectively eliminate tribal taxing programs by superimposition of state taxes, the Tribes' separate and independent existence, reservation of which has been the long-standing central tenet of federal Indian policy, will be seriously compromised.

Imposition of the state tax will also seriously interfere with the existing balance of the respective jurisdictions of the states, the tribes and the federal government on the reservation. Because of the poverty of the Reservations and the lack of any substantial tax base, imposition of the state tax will have a particularly exaggerated effect. It must be emphasized that the statutes enacted by Congress are predicated on an assumption of lack of state jurisdiction over Indian reservations absent congressional authorization. When Congress has wanted state law to apply on Indian reservations, it has specifically authorized such application by statute. Its decision regarding the respective balance of state, federal and tribal law in such statutes as Public Law 83-280, the Self-Determination and Education Assistance Act and the Indian Reorganization Act should be left undisturbed. Congress is, of course, well aware how to extend state laws to Indian reservations when it chooses and its failure to do so should be regarded as determinative.

Finally, application of state law will foreclose policy options which are the sole prerogative of Congress. It will take away the Tribes' ability to reach a level of economic self-sufficiency consistent with federal policy by utilizing

tax laws as an instrument of encouraging economic growth. If a policy decision is to be made that the Tribes should not utilize tax laws as a tool to govern the reservation and control the nature and extent of their economic growth, that decision is for Congress, not the legislature of the State of Washington.

## IV. Enforcement of the Washington Cigarette Tax, R.C.W. Ch. 82.24, upon Tribally Taxed Sales of Cigarettes on the Reservation Will Result in Imposition of a Multiple Tax Burden Which Unconstitutionally Discriminates Against Indian Commerce in Violation of Article I, §8 of the United States Constitution.

In Section III B, *supra*, the Tribes demonstrated that *Moe* does not foreclose analysis of "negative implications" of the Indian Commerce Clause; it addressed only the lack of any constitutional "automatic exemption." Notwithstanding the absence of any "automatic" exemption, the Indian Commerce Clause prohibits application of state laws shown by the Tribes to discriminate against Indian commerce.

This distinction is highlighted by a parallel development in the interstate commerce decisions of this Court in which an analogous automatic exemption from state privilege taxes on interstate commerce had arisen. In *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977), the Court overruled *Spector Motor Service v. O'Connor,* 340 U.S. 602 (1951), which had held that a tax on the "privilege" of engaging in an intrastate activity could not be constitutionally applied to interstate commerce whatever its actual practical impact. The Court noted that the previous rule had rendered

> irrelevant any consideration of the practical effect of the tax [and reflected] an underlying philosophy that interstate commerce should enjoy a sort of "free trade" immunity from State taxation.



430 U.S. at 278.

But in rejecting the automatic "free trade" exemption declared by the Court in *Spector Motor,* the Court left untouched its other decisions holding, for example, that states may not discriminate against interstate commerce. Thus, referring to its other cases, the Court noted that a state tax affecting interstate commerce would be upheld if the tax (1) had a sufficient nexus with the taxing state; (2) did not discriminate against interstate commerce; (3) was fairly apportioned; and (4) bore a fair relation to services provided by the taxing state. 430 U.S. at 277-78, 279.

Properly construed, the Court's footnote in *Moe* simply indicates that, parallel to the removal of the *Spector Motor* "automatic exemption" announced by the Court in *Complete Auto Transit,* no wholesale exemption for Indian commerce exists under the Constitution; the Court's language in *Moe* left unaffected, however, the necessary rule that notwithstanding the lack of any such automatic exemption, the states may no more discriminate against Indian commerce than against interstate or foreign commerce. The Tribes have shown such discrimination.

The factual predicate for the Tribes' assertion is undisputed. As stipulated in the Pre-Trial Order, the Colville Confederated Tribes levy a cigarette tax of four cents per package ($.40 per carton), while the Lummi and Makah Tribes levy a tax of five cents per package ($.50 per carton). Each tribal ordinance provides that the cigarette tax imposed by the Tribe is a tax upon distribution of cigarettes on the Reservation and requires the tax to be added

to the retail selling price. Pre-Trial Order § 2.5, App. 32-34. *See also* District Court Opinion, 446 F. Supp. at 1347, J.S. App. at 7. The state cigarette tax, on the other hand, amounts to $.16 per package ($1.60 per carton). At the present time, due to the smaller tribal tax, 90% of the sales of cigarettes by the Tribes are to non-Indians. 446 at 1347, J.S. App. at 7.

The economic effect of superimposing the state tax on the tribally-taxed sales of cigarettes will be that cigarette excise taxes totaling $.21 (Makah and Lummi) or $.20 (Colville) per package will be imposed on cigarettes sold to non-Indians by the tribal outlets while cigarettes sold *off* the Reservation will be subject only to the $.16 state excise tax. Dr. Trosper, an expert witness for the Tribes, testified:

> [i]f the two excise taxes were applied on the Reservations, the Indian tribal outlets would have a price disadvantage and could no longer successfully compete with nearby cigarette retailers located off the Reservation.

Exhibit 10.19 to Pre-Trial Order, App. 129. As the District Court summarized:

> The State tacitly concedes the Tribes' source of cigarette tax revenue would dry up if they were forced to add the State tax to the costs of their cigarettes. The facts dictate that the tribal taxes could not be a continuing source of income if tribal cigarette sales to non-Indians are also subject to State's cigarette tax; tribal cigarette sales to non-Indians would be eliminated and the cigarette sales commerce between the Tribes and non-Indians would be destroyed. Thus, each Tribe's ability to fund its sponsored programs would suffer substantial interference.

446 F. Supp. at 1347, J.S. App. at 7-8. The state taxing jurisdiction cannot be applied to effect such a result consistent with the Commerce Clause decisions of this Court.



In analyzing the validity of a state tax subjected to attack under the Commerce Clause, the Court focuses its attention on the practical operation of the tax. *See Halliburton Oil Well Cement Co. v. Reily*, 373 U.S. 64, 69 (1963); *Nelson v. Sears, Roebuck and Co.*, 312 U.S. 359, 363 (1941). *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), likewise mandates consideration of whether the tax causes a practical economic effect forbidden by the Commerce Clause rather than of formalistic considerations. 430 U.S. at 288.

Judged by these standards, the state tax as applied to the Tribes, must fail. Notwithstanding the State's rhetoric concerning its "sovereign power over its non-Indian citizens," State. Br. at 65, the real question is whether the tax, as applied, produces a forbidden effect on Indian commerce. This question is resolved by reference to the well-established principle that since a state may not discriminate against interstate commerce, such commerce cannot constitutionally be subjected to the burden of multiple taxation. *Gwin, White and Prince, Inc. v. Henneford*, 305 U.S. 434, 438-39 (1939). Although interstate commerce may be made to "pay its own way," *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 461-62 (1959), a state may not "impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business . . . or by subjecting interstate commerce to the burdens of 'multiple taxation.'" *Id.* Even a tax which does not discriminate against interstate commerce when viewed in isolation or on its face, is nevertheless invalid under the Commerce Clause if it places on interstate commerce

> burdens of such a nature as to be capable . . . of being imposed, . . . or added to, . . . with equal

> right by every state which the commerce touches, . . . so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.

*Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 255-56 (1938).[65]

While it is true that the taxpayer has the burden of establishing a multiple burden, *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), the Tribes have sustained that burden by showing that the Indian commerce will bear a greater tax burden than off-reservation sales of cigarettes if the state tax is imposed. *See Evco v. Jones*, 409 U.S. 91, 94 (1972), in which a state gross receipts tax levied against proceeds from out-of-state sales was held invalid because

> interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.

*See also Standard Oil v. Peck*, 342 U.S. 382, 84-85 (1952); *Central Railroad Co. v. Pennsylvania*, 370 U.S. 607, 612 (1962).

In *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), this Court sustained a compensating use tax imposed by Washington which granted a tax exemption for anyone who had paid a sales or use tax in another state. 300 U.S.

65. One commentator has summarized the combined effect of these cases as follows:

> In defining the negative implications of the Commerce Clause for state taxation, the Supreme Court has emphasized two related but distinct consequences of state taxes, either of which renders a particular tax unconstitutional: (a) discrimination against out-of-state commerce in favor of local competitors; and (b) cumulative burdening of interstate commerce by several states' collection of similar taxes.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 354 (1978).



at 581. Although the Court reserved the question whether a state which imposed a compensating use tax would be constitutionally required to give credit for sales or use taxes paid on the same goods in another state, 300 U.S. at 587, most states have concluded that such credit is required. As of 1971, 30 states and the District of Columbia were giving credit in their compensating use tax for sales taxes paid in other states, and 12 states were providing reciprocal credit for sales taxes paid in those states which also provide credit.[66]

Although this Court has not yet had occasion to rule whether such credit *must* be given, the Court recently noted in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), that the Washington tax in *Henneford* was sustained because of the "equal treatment of interstate commerce" involved in the Washington scheme. The Court stated:

> Equal treatment of interstate commerce, lacking in [the case before the Court] has been the common theme running through the cases in which this Court has sustained "compensating" state use taxes. In *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), Washington imposed a 2% sales tax on all goods sold at retail in the State. Since the sales tax would have the effect of encouraging residents to purchase at out-of-state stores, Washington also imposed a 2% "compensating tax" on the use of goods within the State. *The use tax did not apply, however, when the article had already been subjected to a tax equal to or greater than 2%. The effect of this constitutional tax system*

66. Only four states provide no credit in any circumstances. J. DUE, STATE AND LOCAL SALES TAXATION, 249-50 (1971). In addition, in 1976 the Multi-State Tax Compact was formed which was designed to bring greater uniformity of state action in the tax field; it requires all states to give credit for sales taxes paid to other states. *Id.* at 263. Washington is a member. *Id.*

*was nondiscriminatory treatment of in-state and out-of-state purchases.*

429 U.S. at 331. (emphasis added)

In the instant case, on the other hand, the State gives strong incentive to its citizens to avoid engaging in cigarette trade with the Tribes since they will be penalized by being forced to pay a higher total tax than if they transact business off the reservation. Such discrimination by the State is prohibited; it violates the constitutional premise that "equal treatment for in-state [on-reservation] and out-of-state [off-reservation] tax payers similarly situated is the condition precedent" for a valid state tax on transactions protected by the Commerce Clause. *See Halliburton Oil Well Cement Co. v. Reily*, 373 U.S. 64, 70 (1963).

Perhaps anticipating these arguments,[67] the State argues that nothwithstanding the imposition of the tribal tax, the State may tax the same transaction: "[W]hat we have then is a classic situation of two jurisdictions—each having taxing power—exerting that power against the same individual or transaction." State Br. at 62. In support, the State cites *Austin v. New Hampshire*, 420 U.S. 656 (1975); *Guaranty Trust v. Virginia*, 305 U.S. 19 (1938); and *Fort Smith Lumber Co. v. Arkansas*, 251 U.S. 533 (1920). None of these cases, however, involve interstate commerce; they merely hold that there is no prohibition in the Privileges and Immunities and Due Process Clauses against a state

67. In its Brief at 63 n. 47, the State says:

> Here, there is no claim that Washington's cigarette and sales taxes as applied to non-Indians purchasing cigarettes from reservation retailers, are discriminatory.

Obviously, the Tribes *are* arguing that the state tax as applied discriminates against Indian commerce. The same arguments were made to the District Court below. *See* Plaintiffs' Trial Brief 58-63; *see also* 446 F. Supp. at 1356, J.S. App. at 24.



tax on property or an activity that has already been taxed by another state.[68] In the context of interstate, foreign or Indian commerce, on the other hand, multiple taxation is prohibited if a cumulative burden is placed on the protected commerce that exceeds that borne by local commerce.

Finally, it is apparent that the existence of the tribal tax, and the resulting multiple tax burden, distinguishes this case from *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). In *Moe*, no tribal tax was imposed, 392 F. Supp. 1297, 1313, and no multiple tax burden discriminating against Indian commerce was imposed.

In conclusion, this section has demonstrated that Indian commerce, no less than foreign or interstate commerce, is federally protected, and, at a minimum, is immune from state discriminatory action. The fact that the Indian Commerce Clause was juxtaposed by the Founding Fathers to the Interstate and Foreign Commerce Clauses in Article I, § 8 strongly supports this analogy, particularly in light of the fact that originally the Indian Commerce Clause was entirely distinct.[69] The Founding Fathers clearly intended that parallel protections would be available for Indian commerce.

Since the state cigarette excise tax, unlike the compensating use tax involved in *Henneford, supra*, is not properly

68. In *Austin*, however, the Court struck down a New Hampshire tax which purported to tax the income of non-residents while no similar tax was filed against resident employees on the basis of a "rule of substantial equality of treatment for the citizens of the taxing State and non-resident tax payers." 420 U.S. at 665.

69. *See* Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 MINN. L. REV. 432, 467-68 (1941). *See* note 46 and Section III A, *supra*.

"apportioned" in the sense that it gives no credit for taxes already paid to other jurisdictions, the Tribes have not addressed the potential issue of the validity of a state tax which *does* give credit for taxes already paid a tribe. That issue is simply not presented by this case and it would be premature to address it here.

However, while the analysis presented in this section considers Indian commerce to be analagous to interstate commerce, Section III strongly suggests that stricter standards apply. The Indian Commerce Clause, like the Foreign Commerce Clause, was designed largely to protect political as opposed to purely economic relations, and Indian commerce, like foreign commerce, enjoys a special status under the Constitution. *Cf. Japan Line, Ltd. v. County of Los Angeles*, .... U.S. ...., 60 L. Ed. 2d 336, 345-49 (1979). In addition, the previous sections demonstrate that federal statutes and policies protecting tribal government preempt state laws which infringe upon essential tribal governmental relations. Whatever the scope of these protections, it is clear, as an absolute minimum, that the state cigarette excise tax discriminates against Indian commerce and is therefore invalid.

**V. The State Cigarette Tax, as Applied to the Tribal Enterprises, Has Been Preempted by the Federal Traders Statutes.**

As this Court observed in *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 686-87 (1965):

> [F]rom the very first days of our Government, the Federal Government . . . [has] exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes.



The present statutes governing trading with the tribes are found in 25 U.S.C. §261, et. seq. which provides:

> The Commissioner of Indian affairs shall have *sole* power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quality of goods and the prices at which such goods shall be sold to the Indians.

(emphasis added) The operator of each of the respective tribal cigarette outlets is required by tribal ordinance to possess a federal traders license and, under the authority of the federal licensing scheme, conducts trade with both Indian and non-Indian customers. The question presented is whether, consistent with this Court's holding in *Warren Trading Post* and the federal statutes and regulations, the State of Washington can levy the tax in question and force the federal Indian trader to collect it.

In *Warren Trading Post*, the Court held an Arizona tax on the gross proceeds of a federal trader doing a retail trading business with Indians on the reservation to be preempted. In the instant case, the circumstances are reversed in that it involves Indian federal traders selling to non-Indians, but the reasoning of this Court suggests that the ultimate conclusion ought to be the same. As the Court summarized:

> These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that *Congress has taken the business of Indian trading on the reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.*

380 U.S. at 690. (emphasis added) And:

> We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall

> be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed . . . .

*Id.* at 690-91. Indeed, in the instant case, since the federal traders are Indians, the preemptive scope of the statutes should be broader in scope.[70] Further, imposition of the state taxes in the instant case will have an even more deleterious effect because of the presence of the tribal tax. In all probability the commerce between the Indian traders and the non-Indians on the Reservations will be destroyed. To say that this is every bit as much a "financial burden" on Indian traders as the one disapproved in *Warren Trading Post* is an understatment.

Finally, the provisions of Excise Tax Bulletin 504.08.192, *see* §2.37 of the Pre-Trial Order, App. at 46, would add serious burdens to the federal traders. The Bulletin requires the federal traders to keep the names and tribal affiliations of all Indian purchasers, dollar amounts and days of sales, and to segregate sales to Indians and non-Indians. Since the focus of federal policy in the federal traders statutes is to avoid imposing financial burdens on Indian traders or on the Indians with whom they deal, these administrative burdens cannot be tolerated and were,

70. In its opinion the Court cited with approval an opinion by the Solicitor of the Department of Interior which had interpreted the federal statute to bar state sales taxes of sales *by* or *to* Indians. *See* 57 I.D. 129, 141 (1940), cited at 380 U.S. 690. The Solicitor stated:

> A sales tax placed upon sales *by Indian enterprises* or to Indians on the reservation or on the business of making sales would be an interference with the regulation of trade and prices by the Commissioner.



therefore, correctly struck down by the District Court. 446 F.Supp. at 1359, J.S. App. at 29-30.[71]

## VI. The State Cigarette Tax Is Invalid Because Its Legal Incidence Falls upon the Tribe or Operator of the Tribal Outlet.

The arguments set forth above are premised upon an acceptance of the District Court's conclusion that the legal incidence of the state tax falls upon the non-Indian purchaser even though the State asserts that the Tribe or tribal outlet operator has the legal obligation under the state statute to collect the tax. An examination of this section of the District Court's opinion, however, as of the State's argument in support of this conclusion, reveals the mental gymnastics necessary to sustain the State's position on this issue. *See* 446 F. Supp. at 1351-56, J. S. App. at 15-24. Ultimately, the District Court's conclusion was premised on its acceptance at face value of the holding of the Washington State Supreme Court in *Tonasket v. State*, 84 Wn. 2d 164, 525 P.2d 744 (1974). However, in light of a series of inconsistent state court decisions, the Tribes believe that the *Tonasket* opinion can only be described as a charade.

The District Court correctly concluded that when a federal tax immunity is affected by a determination as to the legal incidence of the state tax, "the federal courts 'are not bound by the state court's characterization of the tax.' " 446 F. Supp. at 1352, J.S. App. at 17, citing *First Agricultural Bank v. Tax Commission*, 392 U.S. 339, 347 (1968).

71. The Tribes do not believe that this analysis is foreclosed by the Court's statement in *Moe*, 425 U.S. at 482, that *Warren Trading Post* did not apply to that case. The Indian retailers in *Moe* so far as the opinion reveals, neither applied for nor obtained federal traders licenses. The *Warren Trading Post* holding, therefore, was not directly implicated.

*See also United States v. Mississippi Tax Commission,* 421 U.S. 599 (1975).

The District Court also correctly ruled that since the state cigarette tax contains no mandatory provision requiring that the tax be passed on to the ultimate consumer, the decisions of this Court "do not necessarily require a conclusion that the legal incidence of State's cigarette tax is on the buyer." 446 F. Supp. at 1353, J.S. App. at 18. The District Court based its determination on divination of legislative intent, as guided by the Washington State Supreme Court in its *Tonasket* opinion.[72]

The operative sections of the statute which define the legal incidence of the Washington cigarette tax are found in RCW 82.24.020 and RCW 82.24.080. The former provides in part:

> There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes in an amount equal to the rate of six and one-half mills per cigarette.

RCW 82.24.080 provides:

> It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, handled, or possessed, or distributed within the state and *to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively in accordance with R.C.W. 82.24.020) or distributes them in this state. . . .*
>
> It is also the intent and purpose of this chapter that the *tax shall be imposed at the time and place of the first taxable event occuring within this state.*

(emphasis added)

72. The tax involved in the instant case is completely distinct from the tax involved in *Moe.* As the Supreme Court there emphasized, the Montana statute provided that the cigarette tax "shall be conclusively presumed to be [a] direct [tax] on the retail consumer precollected for the purpose of convenience and facility only." 425 U.S. at 482. The statute also contained a provision that although the tax was to be paid in advance by the seller, it was to be "considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user." *See* 392 F. Supp., 1297, 1308. In determining the legal incidence of the Montana tax, therefore, the Court simply followed its previous holding in *United States v. Mississippi Tax Commission,* 421 U.S. 599, 608 (1975), that "where a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser."

As noted above, the Washington state tax contains no such provision and its legal incidence is open to question.



Since the Appellee Tribes possess, handle and distribute cigarettes before they are sold to Indian or non-Indian consumers, a straightforward reading of the statute indicates that the legal incidence of the tax, being upon the first taxable event, would fall upon the Tribes. Indeed, that is how the State Supreme Court has interpreted the statute in a number of cases. In *Makah Indian Tribe v. State Tax Commission,* 72 Wn.2d. 613, 434 P.2d 580 (1967), the state court noted that in its practical operation, the Washington cigarette tax applied to and was paid by the wholesalers who distribute the cigarettes to retail outlets for resale. 72 Wn.2d 614, 434 P.2d 581. In *P. Lorillard Co. v. Seattle,* 83 Wn.2d 586, 521 P.2d 208 (1974), the court concluded:

> The person taxed is the person who first sells, uses, consumes, handles, possesses or distributes cigarettes in this state. R.C.W. 82.24.080.

*Id.* at 589, 521 P.2d at 210. Similarly, in *Canteen Service, Inc. v. State,* 83 Wn.2d 761, 522 P.2d 847 (1974), the state court stated:

> The legal incidence of a tax falls upon the person or entity who has the legal obligation to pay the tax. . . .
>
> The legal incidence of the cigarete stamp tax is upon the person who first sells, uses, consumes, handles . . .

> or distributes them in the State. R.C.W. 82.24.080. *Thus, the legal incidence of the tax will fall upon the one who first brings the cigarettes into the State and does any of the mentioned acts.*

*Id.* at 762, 522 P.2d 848. (emphasis added) According to the State, however, this analysis holds true in all cases except when the seller of the cigarettes is an Indian tribe or Indian.

In *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744 (1974), the state court, after noting that it was "dubious" whether the state cigarette tax could be applied to retail transactions with Indians, stated:

> [I]t would appear logical to conclude that the first taxable event would be the resale of the cigarettes to a non-Indian, at which time Mr. Tonasket [the tribal retailer] could be required to affix the tax stamp and collect the amount of the tax from the non-Indian consumer.

*Id.* at 181, 525 P.2d at 754. The State's construction of the Washington Supreme Court's language is that it means that an enumerated taxable event in the statute is not a taxable event unless it is constitutionally taxable. This maneuver, designed only to avoid the holdings of this Court in *McClanahan* and *Moe* regarding taxation of reservation Indians, cannot be sustained. Not only does it have no basis in the statute, but it leads to discriminatory results. In all other cases under the statute, RCW 82.24.080 explicitly provides that the legal incidence of the tax and the obligation to pay the tax fall upon the same person. In the case of an Indian tribe selling to a non-Indian, however, the State argues that the legal incidence bounces along the statutorily enumerated chain of events until it reaches the non-Indian but the obligation to pay the tax



remains with the Tribes.[73] The statute, so interpreted, clearly violates the Equal Protection Clause, *cf. Southern Ry. v. Greene*, 216 U.S. 400 (1910), and discriminates against Indian commerce. *Cf. Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). *See* Section IV *supra.*

Further, as to the practical enforcement of the statute, the State appears to be speaking out of both sides of its mouth. As noted in the Statement of Facts, the State has seized unstamped cigarettes from the Tribes and has indicated its intention to do so in the future. But if the legal obligation to affix the stamps and collect the tax does not arise until the cigaretes are sold to a non-Indian in conformity with the *Tonasket* holding, how can it be said that the Tribes have violated the law so as to bring into effect the State's enforcement mechanisms? If the State wants a tax statute which imposes the legal incidence of the tax on the consumer, it should amend its statute to so provide as to all cigarettes sold, and like Montana thereby avoid the dicrimination inherent in existing state law.[74]

---

73. *See* RCW 82.24.260 which, as amended in 1975, provides in part:

> Any retailer who sells or otherwise disposes of any unstamped cigarettes other than . . . a federally recognized Indian tribal organization with respect to sales to enrolled members of the tribe shall collect from the buyer or transferee thereof the tax imposed on such buyer or transferee by R.C.W. 82.24.020 . . . and remit the same to the Department . . .

The statute applies only to Indians and tribes selling to non-Indians since in all other cases, the stamps will have already been affixed.

74. The Tribes will not attempt to fully address the other enforcement issues presented by this case. It its decision, the court below noted that in view of its conclusion that the state cigarette tax could not be lawfully applied to sales by the Tribes to non-Indians, any state enforcement would also be unlawful; it therefore declined to reach the merits of the Tribes' additional claims that the enforcement measures were independently violative of federal law and the Constitution. The Tribes will not discuss the issue further here, except to note that even if the state tax is valid, the enforcement problems are nevertheless substantial. For example, RCW 82.32.210 authorizes the State Tax Commission to levy

[Footnote continued on page 124]

## VII. The State Motor Vehicle, Mobile Home, Camper and Travel Trailer Excise Taxes, RCW Ch. 82.44 and 82.50, Are Invalid as Applied to the Tribes or Their Enrolled Members.

This issue[75] arises because of the State's attempts to enforce its motor vehicle excise taxes on tribal and Indian-owned motor vehicles which are used both off and on the reservations. The State concedes that it may not tax Indian or tribally-owned vehicles which are used exclusively *on* the reservation, but argues that if vehicles are driven both on and off the reservation, *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), rather than *McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973), controls and the state tax may be imposed. In light of the practical operation of the State's tax and the holding of this Court in *Moe,* however, the State's argument is untenable.

The critical language of the statute is found in RCW 82.44.020, State Br. App. R at 27a:

> An excise tax is imposed for the privilege of using in the state any motor vehicle, except those operated under dealer's licenses. The annual amount of such excise shall be 2% of the fair market value of such vehicle: *Provided,* That in no case shall the tax be less than $2.00.

RCW Ch. 82.50, imposing a tax on travel trailers and campers is to the same effect. State Br. App. S at 30a.

upon the real and personal property of the taxpayer. Obviously, application of these provisions to Indian trust property is problematic. Further, because these enterprises are run by the Tribes themselves, serious enforcement problems arise because of the Tribes' sovereign immunity. *See e.g. United States v. United States Fidlity and Guarantee Co.,* 309 U.S. 506, 512 (1940); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). If this Court does sustain the state taxes, the case should be remanded to determine the legality of the State's enforcement as applied to the Tribes.

75. The Tribes moved to dismiss this portion of the State's appeal in their motion to Dismiss or Affirm at 8 on the ground that the Notice of Appeal was not timely filed. Those arguments will not be repeated here.



While the excise tax is nominally on the "privilege of using in the State any motor vehicle," clearly the tax is imposed upon a percentage of the fair market value of the vehicle. The tax does not vary in amount with the proportion of on-reservation to off-reservation use. RCW 82.44.060 provides that the excise tax is due and payable at the time of registration of a motor vehicle. As the State explains in its Brief, State Br. at 111 et seq., payment of the tax is necessary in order to obtain a state registration and license.

The District Court's resolution of this issue is unassailable:

> Although there is no doubt that *Mescalero* would control if this issue involved use exclusively off the reservation, we do not agree that *Moe* is not controlling on the facts presented here. A review of the District Court's decision in *Moe* reveals that the vehicle use there taxed was partly on and partly off the Flathead Reservation. *Confederated Salish & Kootenai Tribes v. Montana,* 392 F.Supp. 1325, 1328-29 (D.Mont. 1975), *aff'd,* 425 U.S. 463 (Smith, J, concurring and dissenting). Moreover, the Montana tax invalidated in *Moe* was, except for labeling, identical in operation and effect to the tax here imposed.

446 F. Supp. at 1365, J.S. App. at 42. As the District Court noted, the State below and in its Brief to this Court seeks to distinguish *Moe* on the ground that the tax imposed by Montana was a "personal property tax" while the State's tax is labeled a "excise" or "privilege" tax. But both taxes are measured by the fair market value of the property at a given date each year, and there is no difference in practical operation between the two statutes. 446 F. Supp. at 1366, J.S. App. at 43. The question, therefore, is whether the Washington tax should be sustained simply because it has been more artfully drafted. The decisions of this Court, however, eschew such an approach when a question arises

as to the validity of a state tax challenged on federal grounds.

As noted above, in Section IV, *supra*, this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), strongly indicated that interstate tax cases should turn not upon "the formal language of the tax statute, but rather its practical effect . . . ." 430 U.S. at 279. Similarly, in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), the Court stated that in determining whether a state law stood as an obstacle to the accomplishment of the full purposes and objectives of Congress, the Court was required to "consider the relationship between the state and federal laws as they are interpreted and applied, not merely as they are written."[76] 430 U.S. at 526.

This tax, notwithstanding its label, operates as a property tax because it is assessed annually on a given percentage of the fair market value of the motor vehicle. In these circumstances the tax cannot be sustained. As this Court observed in *Bryan v. Itasca County*, 426 U.S. 373, 377 (1976):

> On the authority of *McClanahan, Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) held this Term that in the absence of Congressional consent the State was disabled from imposing a personal property tax on motor vehicles owned by tribal members living on the reservation. . . .

76. Since the issue presented by the application of the State's tax relates to a state tax on reservation Indians, this issue is likewise a federal preemption issue. *See McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 462 (1976).



## CONCLUSION

Imposition of the state cigarette excise tax will fundamentally interfere with the self-government of the Appellee Tribes. The state statute has a discriminatory impact on the Tribes because it will result in the imposition of a multiple tax burden not shared by off-reservation transactions and will ultimately not only be ruinous of the tribal tax systems, but also be destructive of the protected commerce with the Tribes. Further, the state tax infringes upon the constitutionally reserved prerogatives of Congress to govern political and economic relations with the Tribes. It is in irreconcilable and direct conflict with the policies of the United States as legislated by Congress and as approved by the Executive Branch in specific application to the tax ordinances of the Appellee Tribes. The judgment of the District Court should therefore be affirmed.

Respectfully submitted this 5th day of July, 1979.

STEVEN S. ANDERSON
ZIONTZ, PIRTLE, MORISSET
ERNSTOFF & CHESTNUT
*Counsel for Appellee Indian Tribes*

Of Counsel:
Robert L. Pirtle
Alvin J. Ziontz

## APPENDIX A

25 U.S.C. §476

### §476. Organization of Indian tribes; constitution and by-laws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, c. 576, §16, 48 Stat. 987.

## APPENDIX B

25 U.S.C. §478b

### §478b. Laws, treaties and rights unaffected by passage of sections 461 to 479

All laws, general and special, and all treaty provisions affecting any Indian reservation which has voted or may vote

to exclude itself from the application of sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said sections. Nothing in said sections shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe, where such tribe voted not to exclude itself from the application of said sections. June 15, 1935, c. 260, §4, 49 Stat. 378.

## APPENDIX C

25 U.S.C. §450

**§450. Congressional statement of findings**

(a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that—

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the



diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

Pub. L. 93—638, §2, Jan. 4, 1975, 88 Stat. 2203.

25 U.S.C. §450a

**§450a. Congressional declaration of policy**

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

Pub. L. 93—638, §3, Jan. 4, 1975, 88 Stat. 2203.

## APPENDIX D

25 U.S.C. §1301

**§1301. Definitions**

For purposes of this subchapter, the term—

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United

States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possesed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

Pub. L. 90—284, Title II, §201, Apr. 11, 1968, 82 Stat. 77.

25 U.S.C. §1302

**§1302. Constitutional rights**

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;



(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Pub. L. 90—284, Title II, §202, Apr. 11 1968, 82 Stat. 77.

## APPENDIX E

25 U.S.C. §1451

**§1451. Congressional declaration of policy**

It is hereby declared to be the policy of Congress to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

Pub. L. 93—262, §2, Apr. 12, 1974, 88 Stat. 77.

## APPENDIX F

28 U.S.C. §1362

**§1362. Indian tribes**

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Added Pub. L. 89—635, §1, Oct. 10, 1966, 80 Stat. 880.

Supreme Court, U.S.
FILED
OCT 4 1979
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FOR ARGUMENT

IN THE

# SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

**No. 78-630**

STATE OF WASHINGTON, CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,

*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

*Appellees.*

(Continued on inside front cover)

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

## APPELLANTS' REPLY BRIEF

SLADE GORTON,
*Attorney General,*
*State of Washington*

PHILIP H. AUSTIN,
*Deputy Attorney General*

TIMOTHY R. MALONE,

MATTHEW J. COYLE,
*Assistant Attorneys General*

*Attorneys for Appellants.*

Office and Post Office Address: Temple of Justice,
Olympia, Washington 98504. Telephone: (206) 753-5528

STATE PRINTING PLANT OLYMPIA, WASHINGTON

STATE OF WASHINGTON,

*Appellant,*

v.

UNITED STATES OF AMERICA,
and
CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION,

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*Assistant Attorneys General*

*Attorneys for Appellants.*

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---

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

---

## APPELLANTS' REPLY BRIEF

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## INTRODUCTION

This brief is in reply to the briefs submitted by appellees and amici on their behalf. As such, it is limited to the arguments advanced by appellees in support of the

decision below. The appellees have, however, simply not addressed some of the issues raised in the opening brief of the State. Therefore, we will respond to only those issues actually addressed by appellees, and we will discuss the other issues summarily — if at all.[1]

## SUMMARY OF ARGUMENT

**Jurisdictional Questions.** The major jurisdictional question involves the propriety of a three-judge district court coupled with a direct appeal to this Court in accordance with 28 U.S.C. § 2281 (1970) and 28 U.S.C. § 1253 (1970). To the limited extent that this issue is addressed by the United States (which raised it originally by its Motion to Dismiss) we will show that the Solicitor General has apparently abandoned his position that a three-judge district court was not required in this case. Therefore, this case is properly before this Court on direct appeal.

**Validity of the State Cigarette Tax.**

In response to appellees' arguments as to the validity of the state cigarette tax with regard to on-reservation sales by Indians to non-Indians (or non-reservation Indians), we will first briefly address the repeated contention of appellees in the *Colville* case that the true incidence of the tax is on the Indian seller and, for that reason, its imposition is barred by *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) and *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). Then, we will turn to the principal issue on this appeal, which is whether a state may tax *non-Indians* with respect to the use or consumption of cigarettes purchased from reservation Indian retailers under circumstances

[1]For example, in the *Yakima* case (No. 3909) neither the United States nor the Yakima Tribe addresses the issue of state taxation of Indians who are not members of the Yakima Tribe. State Br. 92-96. This issue was decided by the three-judge district court (see J.S. App. 54-55) and listed in the Questions Presented. J.S. 8. We do not discuss this issue here simply because there is no argument to rebut.



where the Tribe also imposes what it calls a tax on the sale of those cigarettes. Additional issues include state taxation of Indians who are not members of the reservation tribe (*Yakima* case only), the methods of enforcement of tribal retailers' excise tax collection responsibility and (in the *Colville* case only) the enforceability of the state motor vehicle excise tax against Indian vehicle owners.

First, by way of introduction, we will show that the essential power claimed by the Tribes is the power to immunize non-Indians from state taxation in order to establish a price incentive sufficient to attract non-Indians to the tribal "smoke shop" enterprises. To be sure, this attraction results in increased sales and increased income to the Tribes and their members. But it also results in non-Indians avoiding *their* obligation to shoulder a fair share of the State's tax burden.

With the claim of the Tribes and the United States thus brought into focus, we will next here examine the legal theories upon which that claim is based. Those theories fall into two categories, which may be described as the "tribal self-government" theory, and the "federal preemption" theory. We will take up each category in turn.

We will show that the right of tribal self-government has never been extended by this Court as far as the United States and the Tribes would extend it here. That right simply does not encompass the power to immunize non-Indians from state taxation as a means of protecting a source of tribal revenue. Rather, that right has been confined, by this Court, to the power of governing the affairs of tribal members and, as shown by *Williams v. Lee*, 358 U.S. 217 (1959), tribal jurisdiction over non-members can be justified only when necessary to immunize tribal members from state jurisdiction and thereby preserve tribal jurisdiction over those members.

Further, we will show that tribal *governmental* power is not really at stake here at all, as it was in *Williams, supra*, and in *Fisher v. District Court*, 424 U.S. 382 (1976) (tribal civil power over tribal members) and *United States*

*v. Wheeler*, 435 U.S. 313 (1978) (tribal criminal power over tribal members). Instead, what is at stake here is a tribal claim to a revenue source, a source which the Tribe partly exploits through what it denominates as "taxes" that are really nothing more than a businessman's mark-up.

This distinction between governmental entities acting in a truly governmental capacity and those same entities acting in a commercial capacity has long been recognized and applied by this Court with respect to States, the United States, and foreign nations. It should be recognized and applied with respect to Indian tribes as well.

The Tribes and the United States would further extend the concept of tribal self-government to build a legal wall around the reservations, immunizing from state law anyone within that wall, Indian and non-Indian alike. But any such extension of the concept is directly contrary to the decisions of this Court, as shown in *Moe*.

We will then take up the claim of federal preemption. We will first show that the District Court's reliance upon section 16 of the Indian Reorganization Act (25 U.S.C. §476 (1976)) is completely misplaced. We will then show that the Indian Commerce Clause does not, of its own force and effect, preempt state taxing power over non-Indians buying cigarettes from Indians. Any such argument, again, is contrary to this Court's decision in *Moe*.

A claim made only in *Colville* (Cause No. 3868 below) will then be taken up; *i.e.*, that the state excise taxes are discriminatory in view of the additional tribal tax on the same transaction, and are therefore violative of the Indian Commerce Clause. Though this claim purports to rely upon analogies to decisions by this Court under the Interstate Commerce Clause, we will show that it is also just so much legal bootstrapping.

The sources of the claim of *statutory* preemption will then be examined. These include the Indian Reorganization Act of 1934, the Indian Financing Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975, and the Buck Act of 1940. Far from establishing



the tribal power here claimed, those acts make it clear that, in the mind of Congress, such a power does not and should not exist.

Next, the claim of preemption by treaty provision will be examined. The key treaty provision is found in Article II of the "Stevens" Treaties which establishes reservations for the "exclusive" use and occupation of tribal members. This claim is, we will show, simply another attempt to build a legal wall around the reservation — to immunize non-Indians as well as Indians from state tax laws. And that attempt, like the similar attempt made under the Indian Commerce Clause, cannot stand after this Court's decision in *Moe*. Thus, neither the Indian Commerce Clause, nor any federal statute, nor any treaty provision, supports the claim of tribal power to immunize non-Indians from state taxes.

Finally, in responding to appellees' arguments to the contrary it is useful to emphasize that *all parties* agree the question turns on whether such state taxation (1) impermissibly interferes with tribal self-government or (2) is preempted by federal law. This was the basic analysis employed by the district court and it is well grounded in the history of this Court's decisions in the area of Indian affairs. *See Williams v. Lee*, 358 U.S. 217 (1959); *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965).

Beyond this one area of agreement, however, appellees disagree with the State and, in some cases disagree among themselves. Therefore, we will identify, within the two sub-issues of tribal self-government and federal preemption, the major arguments of the appellees and we will also indicate (where appropriate) which appellees subscribe to particular arguments.

## ARGUMENT IN RESPONSE TO APPELLEES

### 1. Jurisdictional Questions.

There are, it will be recalled, two jurisdictional questions presented in this case. The first involves the propriety of a three-judge federal district court coupled

with a direct appeal to this court in accordance with 28 U.S.C. §2281 (1970) and 28 U.S.C. §1253 (1970). The second relates to the timeliness of the State's appeal insofar as the district court's decision regarding the state motor vehicle excise tax is concerned. None of the appellees have submitted any arguments whatsoever on the second issue and, therefore, we merely refer the Court to our opening brief at page 49-53. As for the three-judge court jurisdictional issue, we note from the several briefs of the appellees that:

(1) The appellee Indian Tribes in *Colville* are fully supportive of the State's position that a three-judge district court was proper under the circumstances and, therefore, are opposed to the United States' motion to dismiss;

(2) The appellee Yakima Indian Nation in Cause No. 3909 below (hereinafter *"Yakima"*), although supporting the United States' motion to dismiss, has presented no arguments beyond those initially submitted by the Solicitor General in his motion (Yakima Br. 1-3); and

(3) Most importantly, the United States itself has submitted nothing further and, in fact, even seems to have abandoned its earlier position — based upon the Solicitor General's reading of footnote 17 in *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976). See, in particular, the following observation in U.S. Br. 26 n. 6:

> "To this extent, it would seem that *Bryan* and *Wheeler* have qualified the suggestion in *Moe* (425 U.S. at 481 n. 17) that 'existing federal statutes,' rather than the Constitution, are inevitably the immediate source of a valid preemption claim in Indian matters."

Thus, once again, the position of the United States on this question appears to have significantly switched.[2] If

[2]As previously observed, it was the United States which petitioned for the three-judge court in *Yakima*. State Br. 44, 45; see also A. 145. The United States switched position by filing its Motion to Dismiss which, of course, was predicated on the correctness of footnote 17 in *Moe*. See Motion to Dismiss, p. 9. The Solicitor General now suggests that footnote 17 is incorrect, thereby abandoning the grounds for the motion, though not the motion itself.



the United States contends that the Indian Commerce Clause itself is the basis for preempting state taxing power over non-Indians, it can hardly be heard to claim that a three-judge court was not properly convened in this case.[3] Rather than continue this dialogue with the Cheshire Cat, we say no more. Instead, once again, we stand on the arguments extensively presented in our opening brief at pages 32-49; those arguments remain unanswered, and this is reason enough for not repeating them.

### 2. Incidence of the State Cigarette Tax.

As noted above, appellees in the *Colville* case here urge that the district court, which ruled in their favor, was nevertheless wrong in one respect; *i.e.*, in agreeing with the State that the true legal incidence of the cigarette tax is on the non-Indian purchaser rather than on the Indian seller. Briefly, our response to this line of argument by those appellees is as follows:

(1) To begin with, the same contention, with the same supporting authorities, was presented to the district court and there rejected, the court saying:

> "In sum, this Court concludes the statute evidences the legislature's intent to impose the legal incidence of the tax at the earliest constitutional opportunity.

[3]Contrary to the position urged by the Solicitor General and the Tribes, it remains our position that the *Indian* Commerce Clause does not provide any "automatic exemption" from state taxation for non-Indians who purchase cigarettes from tribal retailers. This, however, does not affect the jurisdictional basis for the three-judge court below. That court, quite correctly, based its jurisdiction upon challenges to state statutes under the *Interstate* Commerce Clause. Those state statutes provide for seizure of cigarettes, including off-reservation seizures of cigarettes being shipped from outside the state to the reservations. See State Br. 41-49.

As we have also pointed out, however, there is a second basis for the court's jurisdiction. See State Br. 35-40. Although footnote 17 in *Moe* has made any claim of on-reservation tax immunity insubstantial or "frivolous" (see *Goosby v. Osser,* 409 U.S. 512, 518 (1973)) when that claim is based upon the Constitution itself, rather than upon a statute or treaty provision, it required footnote 17 to make it clear that this is indeed the case. Prior to this Court's decision in *Moe*, it was not clear. But this litigation had been commenced, and the three-judge court had been convened, prior to that decision.

> Where on-reservation tribal sales to non-Indians are involved, the first taxable event is, therefore, the use or consumption by the non-Indian purchaser. In such situations, the legal incidence falls upon the non-Indian purchaser rather than the tribal seller." J.S. App. 23.

(2) That conclusion, in turn, is fully supported by the statutes involved. RCW 82.24.080, as amended in 1972, provides that:

> "It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, handled, possessed, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively, in accordance with RCW 82.24.020) or distributes them in the state. * * *
>
> "It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place *of the first taxable event occurring within this state.* * * *" Br. App. 24a (Emphasis supplied).

And RCW 82.24.260, as amended in 1975, provides that:

> "Any retailer who sells or otherwise disposes of any unstamped cigarettes other than * * * a federally recognized Indian tribal organization with respect to sales to enrolled members of the tribe shall collect from the buyer or transferee thereof the tax imposed on such buyer or transferee by RCW 82.24.020 * * * ." Br. App. 26a (Emphasis supplied).

This 1975 amendment, notably, was adopted by the legislature *after* the Washington Supreme Court decisions in *Makah Indian Tribe v. State Tax Commission*, 72 Wn.2d 613, 434 P.2d 580 (1967), and *Canteen Service, Inc. v. State*, 83 Wn.2d 761, 522 P.2d 847 (1974),[4] and explicitly confirmed the state court's ruling in *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744 (1974),[5] that in the case

[4]Cited by appellees, Colville Br. 121.

[5]Upon which the district court relied and in which the state court said:

> "[I]t would appear logical to conclude that the first taxable event would be the resale of the cigarettes to a non-Indian, at which time Mr. Tonasket [the tribal retailer] could be required to affix the tax stamp and collect the amount of the tax from the non-Indian customer." 84 Wn.2d at 181, 525 P.2d at 754.



of a sale of cigarettes by a non-taxable Indian to a taxable non-Indian, the incidence of the cigarette tax is upon the non-Indian.

(3) The reason for the district court's decision, characterizing the legal incidence of the tax as falling "* * * upon the non-Indian purchaser rather than the tribal seller * * *," in turn, is that under this Court's ruling in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) and *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), the only earlier possible taxable event listed in RCW 82.24.080, *supra*, *i.e.*, the sale, is immune from taxation when the seller is an Indian or Indian tribal retailer.

(4) And finally, no unconstitutional discrimination results from this classification, *i.e.*, non-Indian purchasers from Indians, because as a matter of economic reality it is the purchaser who bears the real burden of the tax whether he buys his cigarettes from a tribal smoke shop (and thus pays the tax himself) or from his neighborhood supermarket where he pays a price which undoubtedly includes a mark-up reflecting the seller's tax obligations. *Accord*, appellees' own brief in *Colville* at p. 110.[6]

### 3. Validity of the Tax as Applied to Non-Indian Purchasers.

#### (a) Introduction.

First, by way of introduction, let us delineate the tribal power which is here being claimed.

The key to understanding that claim is found in some very simple facts of business economics. Clearly, a vast

[6]And *accord*, as well, *United States v. County of Fresno*, 429 U.S. 452 at 464-65 (1977). In fact, if there is any real discrimination, it is against the individual who buys from the supermarket rather than from the Indian smoke shop, for his retail sales tax obligation under RCW 82.08.020, (St. Br. App. 19a) will be based on a seller's purchase price which includes this cigarette tax mark-up, unlike the purchaser of cigarettes from an Indian outlet.

majority of the cigarette sales by the thirty-eight smoke shops involved in this litigation are made to non-Indians. Those smoke shops, however, suffer from a disadvantage in attracting their non-Indian customers. That disadvantage stems from the location of the shops. Simply stated, it takes more time, effort, and gasoline for these non-Indians to go out on the reservation where the smoke shops are located than it takes for them to go to the local supermarket. And hence, the smoke shops will lose their non-Indian customers to the local supermarket unless they can offer a substantial price incentive to compensate their customers for the extra time, effort, and gasoline required to go out to the reservation. The greater the distance, of course, the greater must be the price incentive. On the Yakima reservation, for example, it ranges from $1.20 to $1.40 per carton, depending on the precise location of the smoke shop. (See deposition of Dr. Herrman, quoted at State Br. 19, 20.)

The basic claim of the United States and the Tribes is that this price incentive must come out of the State's pocket — and the majority of the district court so held. The State is to be required to make up for the locational disadvantage of the smoke shops by foregoing its cigarette tax of $1.60 per carton and its sales tax of 5%.[7] For only if the State is prevented from collecting these taxes can the smoke shop operator provide the necessary price incentive to retain his non-Indian customers. Moreover, because the State's tax loss, per carton, would usually be greater than the necessary price incentive, the smoke shop operator would be allowed to keep, as additional profit, at least part of this difference.[8] Thus, both the volume of business and the profit margin per unit of volume could remain high. It is a very nice arrangement — except for the State.

[7]This sales tax would add another $.25, approximately, to the sales price.

[8]The less the required price incentive, of course, the greater the available profit.



The Tribes, not surprisingly, wish to garner some of this profit for the tribal coffers. They would do this through their tobacco ordinances, which lay claim to some of this profit in two ways. First, the ordinances establish the Tribes themselves as the sole source of supply for the smoke shops, thereby allowing the Tribes to take a wholesaler's mark-up. Secondly, the ordinances impose a tax — or more precisely, what they denominate a tax — upon the cigarette business.[9]

It is this tribal "tax" which provides the legal underpinning[10] for the Tribes' claim of immunity from state taxation for their non-Indian customers. Without that tribal tax, this Court's decision in *Moe, supra*, would clearly be applicable. But as a result, the non-Indian customers would lose their immunity from state taxation. And as a consequence of their customers' loss of that immunity, the smoke shop operators would have to forego either their profit margins, or their price incentives to the non-Indians, or perhaps even both. The volume of cigarette sales to non-Indians would accordingly diminish, perhaps disappearing entirely, and with it the tribal "tax" base.

Such a result, say the United States and the Tribes, is contrary to federal law. If the Tribes enact a tax which is dependent upon the volume of business done with non-Indians, the State can do nothing to diminish that volume and thereby diminish the tax base.[11] They would thus have this Court view the imposition of the state cigarette and sales tax upon the non-Indians as the

[9]In the case of the Yakima ordinance, the tax is nominally upon the Indian retailer. In the case of the Colville, Lummi and Makah ordinances, it is nominally upon the buyer. For purposes of analysis of the Tribes' basic claim, however, this difference is irrelevant.

[10]Or more accurately, "bootstrapping".

[11]Including, logically, the repeal of the State's own taxing scheme statewide, for that would have precisely the same effect. If the State did not impose its taxes on the sale of cigarettes there would likewise be no incentive to its non-Indian residents to go out and buy their cigarettes from the tribal outlets.

functional and legal equivalent of a state law expressly prohibiting the tribal tax, or expressly prohibiting the cigarette enterprise entirely.

But viewing the state taxes in this manner would be incorrect. Such a view overlooks completely the business realities. The State, in essence, is telling the Tribes that they may sell all the cigarettes they wish, to Indians and non-Indians alike. And the Tribes may impose any mark-up they wish, and may even impose taxes upon the cigarette business, at any rate they wish.

If, however, this business is conducted at a location somewhere on the reservation, where a substantial price advantage is necessary to overcome that locational disadvantage, that is the Tribes' problem and not the State's. Federal law, we submit, does not require the State to refrain from imposing its taxes in order to make up for the Tribes' competitive disadvantage stemming from their smoke shops' poor locations. As entrepreneurs, the smoke shop operators may very well suffer from a business disability by reason of these poor locations. But the State has no obligation under federal law to compensate for this disability by foregoing its tax on non-Indians.

Yet the District Court imposed precisely that obligation upon the State. And the inequitable — indeed, absurd — consequence of this action by the District Court should not go unnoticed. Non-Indians avoid the burden of state taxes used to provide state services for those same non-Indians — and for Indians as well. Moreover, this benefit of tax immunity is conferred upon these non-Indians very selectively. The majority of cigarett purchasers still live far enough away from Indian reservations that the price incentive offered by the smoke shops does not compensate them for the time and expenses needed to drive from Seattle, for example, or Spokane, to the nearest Indian smoke shop.[12] They still buy their cigarettes at the local supermarket.

[12]We deliberately omit Tacoma, which is adjacent to, and indeed partly included within, the Puyallup Reservation.



And thus, the bulk of the benefit resulting from the State's tax loss flows to a select, albeit substantial, group of non-Indians, and not to the reservation Indians themselves.[13]

(b) **Interference with Tribal Self-government.**

All of the appellees argue that state taxation of non-Indians engaged in economic transactions with reservation Indians impermissibly interferes with the "right of tribal self-government", citing *Williams v. Lee, supra*. Building from the premise that Tribes have the power to tax in order to raise revenues for the support of tribal government, the appellees argue that Indian tribes have a concomitant right to immunize even non-Indians from state taxation in order to maximize tribal tax revenues. For example, the United States contends:

> "* * * the State taxes strike deeply at the tribe's capacity to raise essential governmental revenues. All government, of course, costs money, and independent government requires independent revenues. Like most tribes, the Yakima Nation cannot raise the funds necessary to carry on effective government *without tribally operated or licensed enterprises that cater primarily to non-Indians, and the economic viability of most such businesses depends upon at least some exemption from State taxes.*
>
> "The immunity which members enjoy in their dealings with each other is of little help in providing tribal revenues. Tribal self-sufficiency can be achieved only by trade, or other transactions, *with more affluent non-Indian neighbors*, including those residing on the Reservation." (Emphasis supplied.) U.S. Br. 24.

In the same vein, the Colville Tribe claims:

> "* * * if the states can superimpose their taxes on tribal taxes that are enacted, any business taking

[13]For this reason, viewed as a system for sharing state revenues with the Tribes or their members, a more inefficient and absurd system would be difficult to devise.

place on the reservation will bear a total tax burden greater than off the reservation, and a strong incentive will be provided for non-Indians to do business elsewhere. From the Tribes' perspective, therefore, there can be no peaceful coexistence between state and tribal taxation of on-reservation transactions between Indians and non-Indians; imposition of state taxes will preempt the Tribes' practical, if not legal, ability to tax. *If the Tribes are ever to achieve economic self-sufficiency, attraction of non-Indian business to the reservations is essential.* In light of the stipulated facts and these practical realities, the Appellee Tribes believe it indisputable that imposition of the state tax will substantially interfere with tribal self-government." (Emphasis supplied.) Colville Br. 58-59.

These claims, however, are nothing more than an extension of the district court's determination that the State's taxation of non-Indians interfered with the right of tribal self-government because it deprived the Tribes of a revenue source "* * * needed for tribally sponsored programs." J.S. App. 37.

In order to demonstrate the error of the appellees' argument it is necessary to examine what they say about the source of this right of tribal self-government, the nature of the right, and the ways in which the interference with this right supposedly occurs. Contrary to the assertions of the appellees, this examination shows that the right of tribal self-government is limited to the control of the affairs of members of the Tribe and does not extend to the conferring of tax immunities upon non-Indians.

First, as the United States correctly points out, the source of the right of tribal self-government is the:

> "* * * residuum of aboriginal independence, not the consequence of any 'delegation to them of federal authority.'" U.S. Br. 16.

However, it should also be pointed out that with the conquest of the continent and the Court's retreat from *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the retained sovereignty of Indian tribes has been limited to



governing their own members. As recently stated by this Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978):

> "'[T]he limitation upon [Indian tribes'] sovereignty amounts *to the right of governing every person within their limits except themselves.*' Fletcher v. Peck, 6 Cranch. 87, 147, 3 L Ed 162 (1810) (emphasis added)."

Next, the appellee Tribes argue that the nature of the right of tribal self-government includes the *exclusive right* to prohibit or regulate the activities of non-Indians within the boundaries of the reservation (U.S. Br. 19-21; Yakima Br. 30-37), or at least to regulate by taxation the activities of non-Indians engaged in transactions with Indians (Colville Br. 34-39). Those appellees, as did the district court, rely principally upon *Williams v. Lee, supra*. However, as shown in the State's opening brief at 66-67, *Williams* subjects non-Indians to tribal jurisdiction purely as an *adjunct* to a tribe's jurisdiction over its own members. Here, on the other hand, the State is not seeking to subject tribal members to state taxation; only non-Indians. Thus, *Williams v. Lee* is inapplicable.[14]

Certainly, if the right of "tribal self-government" goes only to the right to govern the affairs of tribal members, the nature of that right cannot be extended to immunize non-Indians from state law, especially in circumstances where it is the non-Indian who reaps the benefit of the immunization. Neither the source of that right — aboriginal sovereignty — nor the nature of the right counsels otherwise. Nevertheless, as previously indicated, the appellees argue that state taxation *of non-Indians* interferes with the right of tribal self-government because it deprives the Tribe of the ability to attract non-Indian

[14]Similarly, the appellees' reliance upon *United States v. Mazurie*, 419 U.S. 544 (1975), is misplaced. That case did not involve the exercise of the tribal right of self-government. Rather, this Court there held that the tribe, in passing an ordinance requiring the licensing of liquor outlets on the reservation, was exercising a power *delegated* to it by the United States.

business to the reservation to serve as a revenue source for tribal programs. Initially, we suggest that this claim is one more properly addressed to Congress than to this Court. If, as a matter of policy, Congress wishes to provide tax exemptions for non-Indians dealing with reservation Indians in order to bolster tribal revenues or economic self-sufficiency, it arguably has the power to do so by affirmative legislation.[15]

Beyond this, however, the claim of the appellees reveals that tribal *governmental power* is not really at stake here at all. Rather, what is at stake is the entitlement of the Tribes to a certain revenue source — but a revenue source which they claim essentially as entrepreneurs, rather than as governments. As the district court found, it is strictly the *"competitive advantage"* enjoyed by the Tribes which results in tax revenues to the Tribe. *See* J.S. App. 7-8, 49-50. Thus, in effect, the Tribes would wrap their proprietary activities in the mantle of governmental power for the purpose of basing their arguments on a concept of tribal self-government.[16]

The entrepreneurial nature of the Tribes' claim is further shown by the nature of the "tax" levied by the Tribes. A true tax is a forced exaction by the government.

[15]We say "arguably" because of an obvious equal protection problem. In *Moe*, this Court rejected Montana's argument that immunity of Indians from state taxation constituted an invidious discrimination against non-Indians on the basis of race. In so doing, the Court applied the test formulated in *Morton v. Mancari*, 417 U.S. 535, 555 (1974):

> "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." 425 U.S. at 480.

As held in *Moe*, a tax immunity for Indians certainly meets this test of rationality. But it is less clear that a conferral of immunity upon non-Indians, simply because they purchase cigarettes from Indians, would likewise meet this test. This question, however, need not be resolved here because, as we will show later, Congress has not, to date, conferred any such immunity.

[16]Appellees observe that the tribal ordinances in question are not merely revenue-raising devices, but also comprehensive regulatory schemes for the sale of cigarettes on the Tribes' reservations. But the appellees nowhere claim that state law conflicts with any substantive aspect of the Tribes' "regulatory schemes".



If the tax is not paid, the government imposing it collects by forcibly taking the taxpayer's property, or by putting him in jail, or both. But here, the charges imposed by the Tribes as applied to non-Indians are not a tax at all; instead, they are simply a form of "mark-up".

Thus, in the *Yakima* case, the tribal "tax" (termed an "administrative fee") is imposed on Indian retailers. The Tribe has established itself as the sole wholesaler for the retailers, and collects the tax *from the retailer* upon the sale of cigarettes to a non-Indian. The non-Indian bears the economic burden, to be sure, but as to him, the Tribe is not imposing a "tax".

Similarly, the charge involved in the *Colville* case, even though ostensibly levied upon the non-Indian purchaser, is a tax in name only. In effect, it is just another form of a mark-up by the entrepreneur selling the cigarettes. As explained in the brief of the *Colville* Tribes:

> "The contacts between the non-Indians and the tribal businesses are entirely consensual and no non-Indian taxpayers have challenged the validity of the tribal tax. Further, because of the structure of the tribal taxes, the taxes are included in the purchase price of the goods sold and are automatically remitted by the taxpayer upon purchase. The Tribes therefore need not resort to either criminal or civil jurisdiction in tribal, federal or state court to enforce the tax."[17] Colville Br. 20.

[17]In *Colville*, the Tribes discuss at length the question of whether, under *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), a tribe may impose a tax upon non-Indians. (Colville Br. 32-49). We have already suggested that this question need not be decided in these proceedings (State Br. 60 and 61, notes 43 and 44). The Tribe's description of how its tax actually works, as quoted above, provides an additional reason for not deciding that question here. If there is never a need to resort to "either criminal or civil jurisdiction in tribal, federal or state court to enforce the tax", and if, instead, the "tax" is enforced solely by the refusal to sell cigarettes to the non-Indian who is unwilling to pay the "tax" part of the selling price, then we are really not dealing with a tax at all. A supermarket chain could do exactly what the Tribes are doing here, by calling part of their mark-up a "tax", and refusing to sell to anyone who is unwilling to pay it. The important question of whether *Oliphant* prohibits tribal imposition of a tax on non-Indians should therefore be reserved for resolution in a case in which a true tax is involved.

This court has many times noted a distinction between governments acting in a sovereign capacity and governments acting in a private or commercial capacity. As summarized in *Alfred Dunhill, Inc. v. Cuba*, 425 U.S. 682 (1976):

> "Distinguishing between the public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other is not a novel approach. As the Court stated through Mr. Chief Justice Marshall long ago in *Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat. 904, 907 (1824):
>
> > 'It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.'

Cf. *Sloan Shipyards* v. *United States Fleet Corp.*, 258 U.S. 549, 567-568 (1922). In this same tradition, *South Carolina* v. *United States*, 199 U.S. 437 (1905), drew a line for purposes of tax immunity between the historically recognized governmental functions of a State and businesses engaged in by a State of the kind which theretofore had been pursued by private enterprise. Similarly, in *Ohio* v. *Helvering*, 292 U.S. 360, 369 (1934), the Court said: 'If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function * * * * When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader * * * .' It is thus a familiar concept that 'there is a constitutional line between the State as government and the State as trader * * * .' *New York* v. *United States*, 326 U. S. 572, 579 (1946). See also *Parden* v. *Terminal R. Co.*, 377 U. S. 184, 189-190 (1964); *California* v. *Taylor*, 353 U. S. 553, 564 (1957); *United States* v. *California*, 297 U. S. 175, 183 (1936)." 425 U.S. at 695-96.



The Tribes are here entering the marketplace as *traders*, and they are demanding that the State forego its taxes upon non-Indians in order to insulate them, as traders, from the effect of competition from other traders, such as local supermarkets. Yet the Tribes would have this Court view their commercial activity as an exercise in *self-government*, on the same legal plane as the operation of a judicial system for their own members (*cf. Williams v. Lee, supra*, and *Fisher v. District Court*, 424 U.S. 382 (1976)), or the operation of a criminal justice system for their own members (*cf. United States v. Wheeler*, 435 U.S. 313 (1978)). But as *Dunhill, supra*, and the cases therein cited show, this Court has never blurred this fundamental distinction in the case of States, foreign nations, and the United States itself. It should not do so now in the case of Indian tribes.

Finally, under this heading, mention should be made of the argument of the United States and Yakimas (but not Colvilles) that state taxation of non-Indians purchasing cigarettes from reservation retailers somehow infringes upon the territorial integrity of the Tribes' reservations. Insofar as this argument lends itself to comprehension, these appellees appear to be claiming that a state loses jurisdiction of its non-Indian citizens when they step upon an Indian reservation or at least on trust or restricted status land. But that has never been the view of this Court. *See, e.g., Utah & Northern Ry. v. Fisher*, 116 U.S. 28 (1885); *Thomas v. Gay*, 169 U.S. 264 (1898). And, to the extent that the argument suggests that the State lacks jurisdiction as a matter of due process to require reservation retailers to collect the tax, that contention, as recognized by the district court, is fully answered by this Court's decision in *Moe*. As stated by the district court:

"In *Moe*, the Court neither mentioned the nexus

requirement nor did it give any special significance to the fact that the Indian retailer secured his inventory from an in-state wholesaler. This was undoubtedly because of the substantial presence of the Indian retailer in the state. After all, the reservation exists within the territorial boundaries of the State. Indians are citizens of the State and are entitled to and do receive services from it. Although this is not sufficient to justify direct state taxation of Indians or Indian tribes in the face of conflicting treaties and/or federal statutes, it clearly constitutes a sufficient link so that the mere imposition of a collection requirement does not violate due process." J.S. App. 27.

Certainly, if the collection requirement, as applied to Indians, does not violate due process, a tax on the State's non-Indian residents does not do so either.

**Summary:**

For the foregoing reasons, the appellees' arguments on interference with tribal self-government are all unpersuasive. The right of tribal self-government does not include the right to immunize non-Indians from state taxation. Furthermore, the Tribes, in engaging in the business of retailing cigarettes to non-Indians, are simply not exercising a power of self-government; rather, they are engaged in ordinary commercial transactions which are not entitled to the special protections inherent in sovereignty. Finally, state taxation of non-Indians purchasing cigarettes from reservation retailers in no way infringes upon the Tribes' territorial sovereignty over their reservations.

(c) **Federal Preemption.**

In addition to their claims of interference with the right of tribal self-government, the appellees contend that state taxing power over non-Indians purchasing cigarettes from reservation retailers has been federally preempted. With differing degrees of emphasis the appellees claim this federal preemption stems (a) from the Indian Commerce Clause, of its own force and effect, and (b) from treaties



and federal statutes encouraging tribal self-government and economic development.

Before responding directly to this series of arguments, however, it bears emphasizing that *no appellee* here attempts to support the finding of the district court that the Tribes are exercising federal powers — delegated to the Tribes under Section 16 of the Indian Reorganization Act (25 U.S.C. §476 (1976)) — in taxing non-Indians. Undoubtedly, appellees recognize that this Court's decisions in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), *supra*, and *United States v. Wheeler*, 435 U.S. 313 (1978), *supra*, foreclose any argument that Section 16 of the IRA *delegates* any federal power to Indian tribes.[18] But the district court's determination that the Tribes were exercising federally delegated power was crucial to its finding of federal preemption. In fact, it will be recalled that the district court rejected the arguments of federal preemption based upon the Indian Commerce Clause and upon statutes, such as the IRA, generally encouraging tribal self-government and economic development. Logically, therefore, the only remaining basis for federal preemption would have been federal delegation. Thus, the failure of appellees to argue (let alone demonstrate) that the district court was correct in its determination that the Tribes were exercising federally delegated powers completely undermines this basis for the district court's decision.

(i) **The Indian Commerce Clause, of its own Force and Effect, is not a Sufficient Basis for Preempting State Taxing Power over non-Indians Purchasing Cigarettes from Tribal Retailers.**

Appellees United States and *Colville* Tribes principally now argue that the Indian Commerce Clause, of its

[18] *Oliphant* and *Wheeler* were decided subsequent to the issuance of the district court's opinion. However, the State raised this point in its motion for reconsideration, citing *Oliphant* and *Wheeler*. See Motion for Partial New Trial, J.S. App. 75.

own force and effect, preempts state taxing power over non-Indian citizens engaged in economic transactions with reservation Indians where the Tribe itself taxes these transactions. According to the United States:

> "The analysis is simply that the Constitution itself — as exemplified in the Indian Commerce Clause — ousts State jurisdiction over all matters within Indian Reservations that significantly touch tribal interests and reserves that area for federal regulation." U.S. Br. 25.[19]

Precisely this same "analysis" was presented to this Court over eighty years ago, in *Thomas v. Gay*, 169 U.S. 264 (1898), in precisely the same context as here, *i.e.*, in determining the taxability of non-Indians doing business with Indians.

> "It is claimed that the legislative assembly of the territory of Oklahoma was without power to enact the law of March 5, 1895, providing for the taxing of cattle grazing upon the Indian reservations under leases granted by the Indians, because, both before and since the creation of said territory, *exclusive jurisdiction over said Indians and their lands, and over all matters in any way affecting them, or in which they are interested, is in the United States.*" 169 U.S. at 268 (emphasis supplied).

In rejecting this argument, the Court stated:

> "The unlimited power to Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations, may be conceded; but it is not perceived that local taxation, by a state or territory, of property of others than Indians would be an interference with Congressional power. * * *" 169 U.S. at 274-75.

The recent decisions of this Court have gone even

[19]Similarly, in the *Colville* case, the Tribes argue:

"[T]he [Indian Commerce] Clause was designed to federalize the political and economic relations with the *tribes*, to the exclusion of the states. A state tax assessed on commerce with the tribal enterprises, which directly impairs the government of the reservations, is therefore prohibited." Colville Br. 68 (emphasis in original).



further than *Thomas v. Gay* in one important respect. They have established that *even for Indians* the Constitution itself provides no automatic tax immunities. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). As summarized in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976):

> "It is thus clear that the basis for the invalidity of these taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause, U.S. Const., Art. VI, cl. 2, and not any *automatic exemptions* 'as a matter of constitutional law' either under the Commerce Clause or the intergovernmental-immunity doctrine. * * *" 425 U.S. at 481, n. 17 (emphasis supplied).

The district court therefore summarily rejected appellees' Indian Commerce Clause arguments saying, on the basis of footnote 17 in *Moe, supra*:

> "[A] full review of [the tribes'arguments] is, however, unnecessary. The simple answer is that such claims have been prohibited by the Supreme Court." J.S. App. 24.

The United States now seeks to escape the impact of this Court's ruling in *Moe, supra*, by suggesting that the Court's later decisions in *Bryan v. Itasca County*, 426 U.S. 373 (1976), and *United States v. Wheeler*, 435 U.S. 313 (1978), have:

> "* * * qualified the suggestion in *Moe* (425 U.S. at 481 n. 17) that 'existing federal statutes,' rather than the Constitution, are inevitably the immediate source of a valid preemption claim in Indian matters." U.S. Br. 26, n. 6.

This bold assertion, unsupported by any analysis, is patently incorrect. It amounts to nothing more than an exhortation to this Court to return to the approach of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Nothing in *Bryan* or *Wheeler* suggests that the Indian Commerce Clause, of its own force and effect, constitutes an

"automatic exemption" for tribal Indians from state law. Even conceding that this clause *does* serve as a basis for exempting *reservation Indians* from state taxation, that principle cannot be extended so as also to exempt *non-Indians* from state taxation. Nothing in the history of this Court's decisions in the area of Indian affairs suggests otherwise.

The *Colville* Tribes, on the other hand, would distinguish *Moe* on this count (*i.e.*, the applicability of the Indian Commerce Clause) because that case dealt only with the issue of state taxation of reservation Indians and did not involve an interference with "tribal self-government":

> "The issue before the Court in *Moe* was the validity of the state sales tax, as applied to on-reservation sales by Indians to Indians.' 425 U.S. at 480. Both *McClanahan* and *Mescalero Apache*, relied upon by the Court for its statement that there was no 'automatic exemption' under the Indian Commerce Clause, also dealt with imposition of state taxation on reservation Indians. Neither *Moe*, *McClanahan* nor *Mescalero* involved any interference with tribal self-government nor any discrimination against Indian commerce." Colville Br. 88-89.

The *Colville* Tribes are also in error. In the first place, *Moe* also involved the imposition of state cigarette taxes upon non-Indians purchasing cigarettes from reservation retailers coupled with a claim of interference with tribal self-government (in terms of subjecting reservation retailers to state tax collection responsibility). *McClanahan*, too, involved a claim of interference with tribal self-government. In response to Arizona's contention that a state income tax imposed upon an individual Indian did not infringe upon the right of tribal self-government, this Court there said:

> "In fact, we are far from convinced that when a State imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination." 411 U.S. at 179.



Then, noting that the *Williams v. Lee* test of infringement with tribal self-government was designed to protect individual Indians, as well as tribes, the Court struck down the tax because it infringed upon the self-governing rights of individual Indians. *See* 411 U.S. at 181.

**(ii) The Indian Commerce Clause, in the Absence of Federal Legislation, does not Prohibit States from Imposing Taxes on non-Indians Purchasing Cigarettes from Tribal Retailers, even where the Tribe Imposes a Tax on the Same Transaction.**

We have just, in effect, dealt with one aspect of this argument, *i.e.*, that even if the Indian Commerce Clause does not afford any *automatic exemptions* to the tribes (*Moe*) it somehow works to immunize non-Indians dealing with reservation Indians from state taxation where, because the tribes are taxing the same transaction, an interference with tribal self-government is claimed. The Colville Tribe further argues, however, that where the Indians are taxing the same transaction, the Indian Commerce Clause also has an impact like that of the Interstate Commerce Clause, U.S. Constitution, Art. I, §8, cl. 3, so as to bar the imposition of "multiple burdens" on Indian commerce. Colville Br. 108-116.

Again, although ruling for the Tribes the district court rejected this same argument, stating that:

> "The cases on which the Tribes rely for support have established a doctrine of 'constitutional law' based upon a construction of the scope and effect of the Commerce Clause in the absence of controlling federal statutes." J.S. App. 24 (citations omitted).

And in noting that this Court in *Moe*, *Mescalero* and *McClanahan* had established the principle that the Indian Commerce Clause provides no "automatic exemption" from state taxation, the district court thus implicitly recognized that the proper analysis involves a search for

federal preemption in the applicable treaties and statutes defining the limits of federal, state and tribal power over Indian reservations.

To this extent, the Tribes' attempt to analogize to the Interstate Commerce Clause is nothing more than an attempt to avoid the result compelled by adherence to the principles established in *Moe, Mescalero* and *McClanahan*. In effect, the Tribes would ask this Court to reject the modern cases and return once again to the analysis of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). For this reason alone, the Tribes' arguments should be rejected. However, we submit that there are additional reasons for not adopting the Tribes' arguments.

First, as earlier argued by the Colville Tribe itself (Colville Br. 83) the Indian Commerce Clause has a "completely different focus" from the Interstate Commerce Clause. According to the Tribe at that prior point in its brief, the Interstate Commerce Clause focuses upon the economic relationships among the states whereas the Indian Commerce Clause focuses upon political relationships between the tribes, states and the federal government.

Second, the result reached by the Tribe in employing the "multiple burdens" analysis to transactions between Indians and non-Indians is inconsistent with a rational resolution of the competing interests involved. The "multiple burdens", if any, on Indian commerce result from the imposition of a tax on the transaction by *two* taxing authorities — the Tribe on whose reservation the sale is made, and the State in whose territory the "use" or "consumption" takes place. It is not caused by the State's tax alone. Also, it must be remembered that the State has jurisdiction as a matter of due process to tax its non-Indian citizens with respect to transactions and property within an Indian reservation because Indian reservations are within the territorial jurisdiction of the State. *Utah & Northern Ry. v. Fisher*, 116 U.S. 28 (1885); *Thomas v. Gay*, 169 U.S. 264 (1898).



Thus, the Tribes' argument under the Indian Commerce Clause to the extent it relies upon an analogy to the Interstate Commerce Clause, presents this Court with a "Hobson's Choice". Given that both the State and the Tribe have jurisdiction to impose a tax upon separate aspects of a related transaction, which tax — if either — must fall? The alternatives are that neither the State nor the Tribe may impose its tax or that both may impose a tax. A "multiple burdens" analysis provides no clue to unlocking this puzzle, primarily because it deals with situations involving the exercise of taxing authority by two or more separate — *in a territorial sense* — jurisdictions.

Moreover, in employing the "multiple burdens" analysis to urge that it is the State's tax which must fall, the Tribe ignores the fact that the purposes of the Interstate Commerce Clause do not include exempting those engaged in interstate commerce from their fair share of a state's tax burden, even though it increases the cost of doing business. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938); *Complete Auto Transit, Inc. v Brady*, 430 U.S. 274 (1977). Nothing in the history of the Interstate Commerce Clause — or for that matter, the Foreign Commerce Clause or the Import-Export Clause — requires a state to *subsidize* commerce carried on within its borders. *See Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978).

Yet this is precisely the position contended for by the Tribes. In effect, the Tribes argue that the Indian Commerce Clause — by analogy to the Interstate Commerce Clause — requires the State to subsidize Indian commerce. Because the Interstate Commerce Clause contains no such requirement, and because the Tribes have utterly failed to demonstrate that the Indian Commerce Clause does contain such a requirement, the analogy completely fails.

Finally, both the *Colville* Tribes and the United States suggest that, at a minimum, the State must give a

"credit" for taxes paid to the Indian tribes. (Colville Br. 113; U.S. Br. 23). We, however, simply fail to understand the basis for this suggestion for it only serves to obscure the true nature of the tribal claim and the legal theory on which that claim is based.

As we have already shown, the Tribes need a competitive advantage in attracting their non-Indian customers in order to compensate for the locational disadvantage of their smoke shops. That competitive advantage must be given in the form of a substantial price incentive to those customers. But that price incentive can be given only if the State foregoes completely its excise taxes on the sales of cigarettes to those customers. If, instead, the State merely gave a credit for the tribal tax, the necessary price incentive would not be given and the competitive advantage would thereby be eliminated. And, under the reasoning of the district court, and that of the appellees as well, such a result would be impermissible. For the tribal revenue, be it in the form of mark-up or "tax", would still dry up, even with the credit for a tribal tax. The essence of the tribal claim is thus truly that the State must forego its taxes completely, and not just give a credit.

### (iii) No Treaties or Federal Statutes Implement an Overriding Federal Policy Requiring Freedom from State Taxation for non-Indians Purchasing Cigarettes from Reservation Retailers.

Next, appellees argue that the State's power to tax non-Indians has been federally preempted by the passage of tribal ordinances "[implementing] an overriding federal policy. *Fisher* [*v. District Court*, 424 U.S. 381 (1976)]" U.S. Br. 26-27; Colville Br. 91-107. This overriding federal policy is characterized by the United States as:

> "Encouraging the tribes to regain a measure of political and economic independence, free of undue interference by outside authority." U.S. Br. 31.



The appellees again are in error. None of the treaties or statutes which they have cited implements an "overriding federal policy" which requires exemption from state taxation for non-Indians purchasing cigarettes from reservation retailers.

At the outset, it should again be emphasized that the appellees do not claim any direct conflict between federal and state law.[20] Rather, they ask this Court to *imply* an exemption from state taxation for non-Indians. But as this Court has noted many times, in the absence of clear statutory guidance a tax exemption, including a tax exemption for Indians, will not be granted by implication. *Choteau v. Burnet*, 283 U.S. 691 (1931); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). Moreover, we are not here even dealing with a tax exemption for Indians; rather we are dealing with a claimed tax exemption for non-Indians. In the absence of some definitely expressed exemption by Congress there is no reason for this Court to *imply* such an exemption.

The appellees rely principally upon the Indian Reorganization Act of 1934, 25 U.S.C. §461 (1976), *et seq.*, the Indian Financing Act of 1974, 25 U.S.C. §1451 (1976), *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450 (1976), *et seq.*[21] Most assuredly, these acts were designed to revitalize tribal self-government and foster tribal economic development. However, as noted by the district court:

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[20] "There is no claim here of an explicit direct conflict between federal and State law. The immediate confrontation is with a tribal ordinance." U.S. Br. 26.

[21] In *Colville*, the Tribes also rely upon the Indian Traders Act, 25 U.S.C. §261 (1976), *et seq.* This reliance, however, is completely misplaced for the reason pointed out by this Court in *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965). The Indian Traders Act is a:

> "* * * statutory plan [which] Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." 380 U.S. at 691.

The purpose of that Act, in short, is to protect Indian purchasers from price-gouging, not to protect non-Indian purchasers from state tax collectors. *See Moe, supra*, 425 U.S. at 482.

"[T]he Supreme Court has never suggested that any of these statutes has of its own force established a policy of implied tax immunity for Indian tribes *or those dealing with Indian tribes.*" J.S. App. 30 (emphasis supplied).

Indeed, in *Mescalero Apache Tribe v. Jones, supra,* this Court refused to imply from section 5 of the Indian Reorganization Act (25 U.S.C. §465) a tax immunity for even a tribal enterprise engaged in business off the reservation. The Court noted that the provisions of the IRA were designed:

"* * * to encourage tribal enterprises 'to enter the white world on a footing of equal competition.' 78 Cong. Rec. 11732. In this context, we will not imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to." 411 U.S. at 157.

If Congress wished to reverse its policy of encouraging tribal enterprise "to enter the white world on a footing of equal competition", it would have done so in clear and unmistakable language.[22]

Indeed, rather than focusing upon such acts as the Indian Financing Act of 1974, *supra,* or the Indian

[22]The American Indian Policy Review Commission apparently agrees with us on this point. It *has recommended* that:

"* * * Congress enact legislation which provides that where an Indian tribal government enacts a tax in furtherance of Federal-Indian policy designed to enhance the tribes' self-governing capacity or to protect or foster tribal economic development of Indian people or the tribe, such tax will have the effect of preempting any competing State tax which would be applicable to the same person or activity." 1 Final Report of the American Indian Policy Review Commission, at 182 (1977).

In effect, the Tribes and the United States contend that this recommendation has *already* been adopted by Congress, although they are not quite certain as to when or where Congress did so. Further, they contend, in essence, that this same recommendation has been adopted *as part of the Constitution itself,* and that congressional adoption of this policy is really unnecessary.

The American Indian Policy Review Commission is correct in suggesting that if its recommended policy is to become federal law, congressional action is now needed; for as yet, it is not federal law at all.



Self-Determination and Education Assistance Act of 1975, *supra,* neither of which has anything to do with state taxes, it is more instructive, we believe, to focus upon acts of Congress which *do* in fact explicitly address questions of state taxing power over Indians and Indian reservations. And the implication to be drawn from those acts is very clear: Congress has never created or attempted to preserve any tax immunity *for non-Indians* on Indian reservations. It has always assumed that no such immunity exists and that it should continue not to exist.

The first act is one relied on heavily by the Yakima Tribe (although not by the other Tribes or the United States), the Buck Act, 4 U.S.C. § 104 (1976), *et seq.* (Yakima Br. 28-29). In *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973), this Court found in that act a Congressional intent to preempt state power to impose taxes *upon reservation Indians,* saying:

"Indeed, Congress' intent to maintain the tax exempt status of reservation Indians is especially clear in light of the Buck Act, 4 USC §§ 104 et seq., which provides comprehensive federal guidance for state taxation of those living within federal areas. Section 106(a) of Title 4 USC grants to the States general authority to impose an income tax on residents of federal areas, but § 109 expressly provides that '[n]othing in sections 105 [authorizing state sales and other excise taxes on federal reservations] and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.' To be sure, the language of the statute itself does not make clear whether the reference to 'any Indian not otherwise taxed' was intended to apply to reservation Indians earning their income on the reservation. But the legislative history makes plain that this proviso was meant to except reservation Indians from coverage of the Buck Act, see S Rep No 1625, 76th Cong, 3d Sess, 2, 4 (1940); 84 Cong Rec 10685, and this Court has so interpreted it. See Warren Trading Post Co. v. Arizona Tax Comm'n, 380 US, at 691 n 18, 14 L Ed 2d 165. While the Buck Act itself cannot be read as an affirmative grant of tax-exempt status to reservation

> Indians, it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event." 411 U.S. at 176-77.

In striking contrast with Section 109, which excludes only the "levy and collection" of any tax on or from any *Indian*, however, Congress showed in the Buck Act absolutely no concern about creating or "jealously protecting" any immunity from taxation for *non-Indians* doing business on Indian reservations. The obvious assumption was that they were taxable, and should remain so.

This same assumption will be found in the second act to be examined, Pub. L. 83-280, 67 Stat. 588, ch. 505 (1953). Section 4(b) of that Act embodies essentially the same policy as that in Section 109 of the Buck Act and reads, in pertinent part, as follows:

> "(b) Nothing in this section shall authorize the alienation, encumbrance, *or taxation* of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States;" (emphasis supplied).

In *Bryan v. Itasca County*, 426 U.S. 373 (1976), this Court construed that language as follows:

> "Indeed, § 4(b) in its entirety may be read as simply a reaffirmation of the existing reservation Indian-Federal Government relationship in all respects save the conferral of state-court jurisdiction to adjudicate private civil causes of action involving Indians. We agree with the Court of Appeals for the Ninth Circuit that § 4(b) 'is entirely consistent with, and in effect is a reaffirmation of, the law as it stood prior to its enactment.' " 426 U.S. at 391.

But if the law relating to "the existing reservation Indian-Federal Government relationship", prior to the enactment of Pub. L. 83-280, conferred some sort of tax



immunity *upon non-Indians* doing business with Indians, as well as Indians themselves, why did not Congress preserve that non-Indian immunity as well? Again, the assumption by Congress was that no such immunity existed, and that was to continue to be the law after passage of Pub. L. 83-280.

Thirdly, holding in *Bryan* that Pub. L. 83-280 did not remove any immunity from state taxation for reservation Indians, this Court also contrasted Pub. L. 83-280 with various termination acts passed by the same Congress as had passed Pub. L. 83-280. Those acts did remove the immunity expressly, thus showing that Congress would likewise have done so expressly in Pub. L. 83-280 as well, had that been its intention. These termination acts are relevant here as well. They are described in *Bryan* as follows:

> "These termination enactments provide expressly for subjecting distributed property 'and any income derived therefrom by the individual, corporation, or other legal entity * * * to the same taxes, State and Federal, as in the case of non-Indians,' 25 U.S.C. §§ 564j, 749, 898, and provide that 'all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.' 25 U.S.C. §§ 564q, 757, 899; cf. 25 U.S.C. § 726." 426 U.S. at 389-90.

If, along with tax immunity for Indians, there also existed tax immunity for non-Indians, why was that not also expressly removed in the termination acts? The answer is simple: the non-Indian immunity never existed, and there was accordingly no need for Congress even to mention it.

Congressional assumptions, and congressional intent implicit in those assumptions, are seldom bright and clear in the field of Indian law. But in the Buck Act, in Pub. L. 83-280, and in the termination acts contemporaneous with

Pub. L. 83-280, we find an exception to this general rule. In those acts, congressional assumptions and intent as to taxation of non-Indians on Indian reservations are very clear indeed: no immunity exists.

(iv) **Treaty Provisions Reserving Indian Reservations for the "Exclusive" Use and Occupancy of an Indian Tribe do not, in and of themselves, Preempt State Taxation of non-Indians Purchasing Cigarettes from Reservation Retailers.**

Finally, the United States and the Yakima Tribe argue that Article II of the Treaty with the Yakimas, 12 Stat. 951 (1855) (St. Br. App. 3a), which reserved the Yakima Indian Reservation for the "exclusive" use and occupancy of the Yakima Tribe, ousts the State of jurisdiction to impose taxes upon non-Indians purchasing cigarettes from tribal retailers on trust or restricted status land within the reservation. In effect, the Yakima Tribe and the United States argue that the Tribe may invite non-Indian customers onto the reservation for purposes of buying cigarettes but it has the power simultaneously to exclude the state tax collector from following those non-Indians onto the reservation for the purposes of collecting taxes from them. This startling claim is unpersuasive.

First, it has long been the rule that a non-Indian is not lost from state jurisdiction, including state taxing jurisdiction, when going upon an Indian reservation. *Thomas v. Gay*, 169 U.S. 264 (1898). Second, the treaty involved in *Moe*, the Treaty of Hell Gate, 12 Stat. 975 (1859) contains the identical "exclusive" use and occupancy language. If that treaty was not sufficient to preclude state taxation of non-Indians purchasing cigarettes from tribal retailers on trust or restricted status land (and it was not), there is no reason to expect that the treaty here involved would be sufficient. Therefore, the arguments based upon the Treaty with the Yakimas should be rejected.



Finally, in somewhat the same vein, in *Yakima* the United States and the Tribe also rely (U.S. Br. 30 and Yakima Br. 15) upon the disclaimer clause contained in the Enabling Act for Washington (25 Stat. 696, ch. 180) (St. Br. App. 5a) and in Article XXVI of the state constitution (St. Br. App. 18a). *Cf., Washington v. Yakima Indian Nation*, ___ U.S. ___, 58 L.Ed.2d 740 (1979). The argument, in essence, is that the disclaimer clause erects a legal wall around the reservation, or at least around reservation trust land, immunizing from state law all transactions between Indians and non-Indians. That argument, however, cannot withstand this Court's decision in *Moe*; for Montana, which became a state under the same Enabling Act as Washington, thus has the same disclaimer clause in its constitution. *See Draper v. United States*, 164 U.S. 240 (1896).

**Summary:**

The arguments advanced by the appellees in support of the decision below are thus ultimately without merit. There is nothing in the history of this Court's decisions in the area of Indian affairs which suggests that an Indian tribe, merely by the enactment of a taxing ordinance, has the power thereby to oust a state of the power to tax its non-Indian citizens with respect to the use or consumption of cigarettes purchased from tribal retailers. If there is to be a tax immunity for non-Indians, we respectfully suggest that it is a policy decision to be made by Congress.

4. **Motor Vehicle Excise Tax Question.**

Lastly, we will here briefly address the argument of the tribes in *Colville* as to the enforceability of all Washington motor vehicle excise taxes with respect to Indian-owned vehicles used both on and off their reservations.

Stripped to its essentials, their argument is this: the Washington tax on motor vehicles, like the property tax on motor vehicles in *Moe*, is measured by the value of those

vehicles. Moreover, as in *Moe*, those vehicles are used both on and off the reservation. And that, according to the Tribes, is the end of the matter; under *Moe*, the Washington taxes are invalid. (Colville Br. 124-26).

This argument by the Tribes fails to consider at all the absolutely critical factor — *where the legal incidence of the tax takes place.* As we have shown at length (St. Br. 111-16), the incidence or tax event in *Moe* took place on the reservation, and only there. Under Washington law, however, the incidence of the motor vehicle excise tax takes place *wherever the vehicle is used,* be it on or off the reservation. And under *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), off-reservation use can be taxed, even though under *Moe,* on-reservation use cannot. Our submission is that short and simple.

## CONCLUSION

Ultimately, the appellees' arguments in support of the decision below are unpersuasive. Appellees have simply not demonstrated that an Indian Tribe has the power to oust the State of its power to tax non-Indian citizens purchasing cigarettes from reservation retailers.

The Indian Commerce Clause, of its own force and effect, provides no exemption for these non-Indians. Congressional legislation likewise provides no such exemption. Indeed, Congress has consistently assumed that states do have such power.

There is nothing in the State's tax which interferes with tribal self-government or conflicts with federal legislation governing the affairs of reservation Indians. Accordingly, this case is on all fours with *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976).

This Court should reverse the decision of the district court and hold that the State may require the Tribes and their retailers to collect the State's cigarette and sales taxes imposed upon non-members of the Tribe in the manner prescribed by state law. Furthermore, the Court



should hold that the State may impose its motor vehicle excise tax upon reservation Indians driving motor vehicles outside the boundaries of Indian Reservations.

DATED this 3rd day of October, 1979.

Respectfully submitted,

SLADE GORTON,
*Attorney General*
*State of Washington*

PHILIP H. AUSTIN
*Deputy Attorney General*

TIMOTHY R. MALONE
MATTHEW J. COYLE
*Assistant Attorneys General*

*Attorneys for Appellants.*

MOTION FILED
JUL 6 1979

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON,
*Petitioners,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION,
*Respondents.*

**On Appeal from the United States District Court for the Eastern District of Washington**

# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE ALL INDIAN PUEBLO COUNCIL, INC.
# and
# BRIEF OF THE ALL INDIAN PUEBLO COUNCIL, INC. AS AMICUS CURIAE

L. LAMAR PARRISH, ESQ.
USSERY, BURCIAGA, & PARRISH
P.O. Box 487
Albuquerque, N.M. 87103

*Attorneys for Amicus Curiae*

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**On Appeal from the United States District Court for the Eastern District of Washington**

---

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE ALL INDIAN PUEBLO COUNCIL, INC.

---

Comes now the All Indian Pueblo Council, Inc., pursuant to Supreme Court Rule 42, by and through its attorney alleges:

1. The All Indian Pueblo Council, Inc. is an organization consisting of the Nineteen Indian Pueblos located in New Mexico duly charted as a non-profit corporation under the laws of the State of New Mexico, the purpose of which is to

act in concert for the advancement of goals common to the Indian Pueblos of New Mexico.

2. Consent has been obtained from the Respondents to file this motion and a brief amicus curiae in this cause. Consent has not been obtained from the Petitioners.

3. The basic questions of law herein are:

(1) Have the State of Washington's taxes levied upon on-reservation sales to non-Indians been preempted by federal policy as embodied in the Indian Reorganization Act, and the Indian Self-Determination Act?

(2) If the Tribal Governments Act to regulate or tax an entity found on Indian land, is the state preempted from regulation or taxation because such state action would amount to non-allowable interference with the tribe's right to self-government?

WHEREFORE, the All Indian Pueblo Council, Inc. respectfully moves the court for an order allowing it to file a brief amicus curiae on the merits in support of the Respondents.

L. LAMAR PARRISH, ESQ.
USSERY, BURCIAGA, & PARRISH
P.O. Box 487
Albuquerque, N.M. 87103
*Attorneys for Amicus Curiae*

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Act of January 4, 1975 (88 Stat. 2203, 25 U.S.C. Sections 450 et. seq.). ..... 2

OTHER AUTHORITY:

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON,

*Petitioners,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION,

*Respondents.*

**On Appeal from the United States District Court for the Eastern District of Washington**

## BRIEF OF THE ALL INDIAN PUEBLO COUNCIL, INC. AS AMICUS CURIAE

### I.

### INTEREST OF AMICUS CURIAE

The Ninteen Pueblo Tribes of New Mexico, either by resolution or policy have shown a particular interest in the development of their own taxing and licensing ordinances. A decision on a state's ability to

extend its taxing authority onto Indian lands would have a direct impact on the development of Pueblo taxing structures.

## II

## ARGUMENT

### Point One

**The State of Washington's Taxes Levied Upon On-Reservation Sales to Non-Indians Have Been Preempted by Federal Policy as Embodied in the Indian Reorganization Act, and the Indian Self-Determination Act.**

There is presently a well established federal policy encouraging Indian self-government and economic development which has found expression in the Indian Reorganization Act of 1934, 48 Stat. 984, and the Indian Self-Determination Act of 1975, 88 Stat. 2203. The Preamble to the Indian Reorganization Act states that it is:

> An act to conserve and develop Indian lands and resources; to extend to Indians the right to form businesses and other organizations; to establish a credit system for Indians; *to grant certain rights of home rule to Indians;* to provide for vocational education for Indians; and for other purposes. (Emphasis added)

One of the rights of home rule is the ability to tax so as to allow for a self-governing structure. The federal government assures such rights under this specific Act. Eighteen of the nineteen Pueblo tribes of New Mexico come under the provisions of the Indian Re-



organization Act of 1934 and therefore have been acknowledged as retaining the aspect of home rule and the capability of taxing entities within their tribal borders.

The declaration of policy within the Indian Self-Determination Act states that:

> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people though the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of federal programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and adminstration of those programs and services.

The policy of the Indian Self-Determination Act is to insure greater control of tribal governments in the determination of the types of services that will be provided their communities. In light of such policy, it would frustrate the congressional intent for the federal or state governments to limit in any way the tribes' ability to extend their taxing authority over entities on the reservation in order to provide additional or supplemental services to present Bureau of Indian Affairs programs. And, for such a policy to work it must be contemplated that burdensome state interference in tribal taxing activities should not occur. The whole intent behind the on-going federal action over the last few years has been a recognition and support of tribal governments' attempts to act as truly self-governing entities. One of the strongest assurances that an entity can continue to be self-governing is its ability to tax. Once such a taxing ability

is removed or hindered, a governmental entity can no longer continue to be self-sustaining.

The nineteen Pueblo tribes of New Mexico are provided services through three different Bureau of Indian Affairs agencies. The Pueblo of Zuni has its own agency located on the reservation, while the remaining ten Pueblo tribes in the southern area of the state are serviced through the Southern Pueblos Agency. The eight Pueblo tribes in the northern part of the state are serviced through the Northern Pueblos Agency. The tribes must presently compete for services from the Bureau of Indian Affairs agencies which must in turn spread their services among several tribes, resulting in extreme diminution of services to the Pueblo communities by the federal government. In like manner the State of New Mexico has never conclusively shown any substantial amount of state taxes returned to Indian communities. Considering the number of businesses that are presently located within the reservation boundaries, as well as a rapidly increasing population within the State of New Mexico,[1] which will have a direct effect on the number of businesses and business activity extending onto the reservations, the ability of the tribes to tax enterprises and businesses found on Indian land is of extreme importance in providing services not now attainable through the limited resources of the Bureau of Indian Affairs. Any limitation of tribal governments' ability to tax or even a diminishing of the amount of revenues which the tribes might be able to gain by such taxes would be an extreme blow to the tribes' right of self-

[1] New Mexico population increased by approximately 200,000 from 1970-1978, and continues to increase at a higher rate. Bureau of Business and Economic Research, University of New Mexico.



government and to their very economic existence. One of the limited number of avenues left to Indian tribes for continued self-sustainment is the levying of taxes on business activities on Indian lands to the preemption of the state government, a right that should not be impaired.

## Point Two

### Where the Tribal Government Acts to Regulate or Tax an Entity Located on Indian Land, the State Is Preempted from Similar Regulation or Taxation Because Such State Action Would Amount to Tribal Governmental Interference.

Since the earliest of times the courts have recognized the sovereign nature of tribal governments, *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515; 8 L.Ed. 483 (1832); *McClanahan* v. *Arizona*, 411 U.S. 164; 36 L.Ed. 2d 129; 93 S.Ct. 1257 (1973); and *Mescalero* v. *Jones*, 411 U.S. 145; 36 L.Ed. 2d 114; 93 S.Ct. 1267 (1973). In 1975, the New Mexico Commission on Indian Affairs in a report for the state entitled, "*Taxation and Indian Sovereignty*" found that:

> ". . . the tribe retains certain asects of sovereignty, subject to congressional action. One attribute of this inherent sovereignty is the power to tax." (At 25)

The study then went on to cite three major cases along this line, *Buster* v. *Wright*, 135 Fd. 947, 203 U.S. 599 (1906); *Morris* v. *Hitchcock*, 194 U.S. 384, (1904); and *Iron Crow* v. *Oglala Sioux Tribe*, 231 Fd. 2d 89 (1965). In the earliest case, *Buster* v. *Wright*, the United States Supreme Court held that:

> Authority of Creek Nation to prescribe the terms upon which non-citizens may transact business

> within its borders did not have its origin in an Act of Congress, treaty, or agreement of the United States, it was one of the inherent and essential attributes of its original sovereignty. (At 950)

This ruling came after action by the Creek Tribes to close non-Indian businesses for not paying a privilege tax which was imposed by the Creek Tribe.

In a report commissioned by the New Mexico Legislative Finance Committee in 1977, in a memorandum entitled, *Jurisdictional Relationships Between the State of New Mexico and Indian Tribes and Pueblos-Taxation*, the report states that:

> . . . it is generally recognized that an Indian tribe has the power to levy taxes on both Indian and non-Indian activities within the boundaries of its reservation. This power exists whether the tribe is operating as a sovereignty or under the Indian Reorganization Act . . . (At 17)

The report further states that:

> New Mexico cannot impose a tax on non-Indian activities within a reservation if the imposition of the tax results in interference with the tribe's rights of self-government or the rights of Indians among themselves. In making that determination all applicable federal laws, treaties and tribal constitutions and laws and state constitutions and laws must be considered. (At 13)

These statements by a State Legislative Committee, are characteristic of the long recognition of the tribe's ability to levy taxes within the confines of the reservation either on Indians or non-Indians.

But, as is stated in the same New Mexico Legislative Committee Finance Report, the question is not



whether the tribes can tax those found within their borders but whether they can tax to the exclusion of the state government because additional state taxes would amount to tribal governmental interference. Though the sovereign characteristics of tribes have been recognized over the years, one must also recognize movement on the part of the courts to limit the action of state governments in those areas where such action might pose an infringement on tribal sovereignty or an infringement on the abilities of the tribe's right to self-government. This governmental interference doctrine was first strongly espoused in the case of *Williams* v. *Lee*, 83 Ariz. 241, 319 P.2d 998, 358 U.S. 217, 3 L.Ed. 251, 79 S.Ct. 269 (1959) and *Kake* v. *Egan*, 369 U.S. 60, 7 L.Ed. 573, 82 S.Ct. 562 (1962) and recently in *Moe* v. *Confederated Tribes*, 425 U.S. 463, 48 L.Ed. 2d 96, 96 S.Ct. 1634 (1976). These cases have sought to define areas in which the state action might result in tribal governmental interference, and therefore state action could not be extended because it would be a hinderance on tribal self-government.

An evaluation of tribal governmental interference seems to be based on a case by case basis. Recently the New Mexico Courts tried to come to grips with this question in two major cases, *Shupe* v. *Bureau of Revenue*, 89 NM 265; 550 P.2d 277 (1976) and *Eastern Navajo Industries* v. *Bureau of Revenue*, 89 NM 369; 552 P.2d 805 (1976). In the *Shupe* case, an out-of-state contractor performing construction on an individual Pueblo was subjected to the state gross receipts tax by the State of New Mexico. The court found in favor of the State Bureau of Revenue, but only because there was not sufficient tribal action to preempt the state's action.

> The Nambe Indians are not paying the contractor: thus from all that appears from the record, the Nambe Indians will not sustain any direct financial burden as a result of this tax. The Nambe Indians have not themselves asserted tax jurisdiction over the taxpayers' activities, although the record reveals that discussions are being had about such a step. There is no indication from the record that the Pueblo will sustain any direct effects as the result of the tax and therefore no conflict with tribal sovereignty is shown. (At 280)

The opinion leads to the conclusion that sufficient tribal action in the form of licensing or taxation would have been sufficient to preempt such state action.[2]

In the case of *Eastern Navajo Industries* v. *Bureau of Revenue*, the State of New Mexico was attempting to tax a corporation that was incorporated under New Mexico law but was located on an Indian reservation and was 51% owned by tribal members. The court held that in this situation any attempt to levy a state tax would constitute illegal intereference with the tribal government:

> A case recently reviewed by the [New Mexico] Court of Appeals, *Shupe* v. *Bureau of Revenue*, 2183, State Bar Bulletin, Vol. 15, No. 7, April 22, 1976, is readily distinguished from the present case. The taxpayer in *Shupe* is a Washington corporation qualified to do business in New Mexico. It is constructing a dam on the Nambe Pueblo under contract with the U.S. Department of Interior, Bureau of Reclamation. Taxpayer presented the issue that the gross receipts tax was

[2] The Pueblo of Nambe passed a resolution establishing their intent to tax after the suit had already commenced.



> illegally imposed because taxpayers activities were on Indian land. This Court held that the tax was correctly accessed to this corporation for two reasons: (1) Taxpayer Corporation was not an Indian entity, and (2) *The imposition of the tax does not infringe on Indians rights of self-government*. (Emphasis added)
>
> Our holding in the present case is the converse: Eastern Navajo Industries is an Indian entity, according to the federal definition, so that imposition of the gross receipts tax on this taxpayer constitutes an interference of Indian self-government. (At 810)

There are approximately 47 Indian owned businesses located in and throughout the nineteen Pueblos in the State of New Mexico.[3] There are approximately 153 non-Indian owned businesses proposed or presently located on Pueblo lands within New Mexico.[4] Twelve of the nineteen tribes have passed resolutions stating their intent to tax,[5] and two tribes presently have taxing ordinances which have been instituted.[6] The Pueblo tribes have entered the sphere of taxation, exercising their inherent taxing authority to the preemption of the state.

[3] *Directory of Indian Owned Businesses*, 1978, All Indian Development Association.

[4] Bureau of Indian Affairs Realty Offices for the Southern Pueblos Agency and the Northern Pueblos Agency, New Mexico.

[5] Appendix-Resolution is similar to those passed by Pueblo Tribes.

[6] The Pueblos of Zuni and Isleta have passed tax ordiances.

## III

## CONCLUSION

The amicus curiae respectfully submit that this court order the decision below be upheld and the decision of the trial court be allowed to stand.

Respectfully submitted,

L. LAMAR PARRISH, ESQ.
USSERY, BURCIAGA, & PARRISH
P.O. Box 487
Albuquerque, N.M. 87103
*Attorneys for Amicus Curiae*

# APPENDIX

**Pueblo of Jemez**

**OFFICE OF THE GOVERNOR**

**P.O. BOX 78**

**JEMEZ PUEBLO, NEW MEXICO 87024**

## RESOLUTION

At a duly called meeting of the Tribal Council of the Pueblo of Jemez, the following resolution was passed:

WHEREAS, the Tribal Council of the Pueblo of Jemez is fully aware that the history of the Pueblo is since time immemorial, that it is an independent sovereign government, and that it has total authority in regulating all activity on tribal lands, and

WHEREAS, the social and economic well-being of the people of the Pueblo of Jemez is of special significance and concern to the Council of the Pueblo of Jemez, and

WHEREAS, all New Mexico Pueblos were recognized and constituted as bodies politic and public corporations and recognized in the nature of municipalities under the New Mexico Territorial Government until the granting of statehood to New Mexico, and

WHEREAS, the term "Indian" and "Indian country" include the Pueblo Indians of New Mexico and the lands now owned or occupied by them, which land and occupation were specifically disclaimed with regard to jurisdiction under the New Mexico Enabling Act, and

WHEREAS, the Federal control over Pueblos is and has been recognized by the United States Gov-

ernment, affirmed in case law, which has held that the Pueblos of New Mexico are Indian Tribes entitled to the same rights of self-government under the Constitution and laws of the United States, and

WHEREAS, taxation of activities and enterprises on Jemez Pueblo land is an inherent right of a sovereign, self-governing people, and

WHEREAS, the power of tribal governments to levy taxes has been upheld by the Supreme Court of the United States, and

WHEREAS, the taxing of revenues obtained from the legitimate exercise of the taxing powers of the Pueblo of Jemez can be used to benefit the people of Jemez Pueblo socially and economically.

NOW, THEREFORE, BE IT RESOLVED that the Pueblo of Jemez has taxed enterprises and activities on its lands, and that it intends to continue to do so, by reason of its own political heritage and the applicable laws of the United States.

BE IT FURTHER RESOLVED that the Pueblo of Jemez intends to supplement its existing law providing for taxation with a comprehensive set of tax ordinances which, in the wisdom of the people of Jemez Pueblo, will best serve the needs of the Pueblo of Jemez, and continue to preserve the Pueblo's right as a self-governing people.

BE IT FURTHER RESOLVED that by passing this resolution, it is the specific intent of the Council of the Pueblo of Jemez to indicate to all other government instrumentalities of whatever nature that it intends to exercise civil and exclusive rights unto itself to impose taxes on persons, activities, and enterprises



within its boundaries and that any such attempts by any other such governmental instrumentality whatsoever shall be considered void and shall constitute an illegal intrusion upon the inherent powers of self-government of the Pueblo of Jemez.

**Certification**

I, the undersigned, as Governor of the Pueblo of Jemez, do hereby certify that the foregoing Resolution was passed at a duly called meeting of the Council of the Pueblo of Jemez held on the 18 day of July, 1978, at which a quorum was present, with 9 voting for and 0 opposing said resolution.

/s/ LOUIS CASIQUITO
Louis Casiquito
*Governor, Pueblo of Jemez*

ATTEST:

/s/ LT. GOV. FRANK F. FRAQUA
Lt. Gov. Frank F. Fraqua
*Secretary*

/s/ JOE L. LORETTO
Joe L. Loretto
*Member of Tribal Council*

/s/ PAT TORA
Pat Tora
*Member of Tribal Council*

/s/ MANUEL SANDIA
Manuel Sandia
*Member of Tribal Council*

/s/ JOE A. SANDO
Joe A. Sando
*Member of Tribal Council*

/s/ HENRY MORA
Henry Mora
*Member of Tribal Council*

/s/ AUGUSTINE SANDO
Augustine Sando
*Member of Tribal Council*

Supreme Court, U. S.
FILED
JUL 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

**No. 78-630**

STATE OF WASHINGTON; CHARLES HODDE; JACK G. NELSON; and ROBERT S. O'BRIEN,

*Appellants,*

*v.*

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

*Appellees.*

STATE OF WASHINGTON,

*Appellant,*

*v.*

UNITED STATES OF AMERICA AND CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

## BRIEF OF AMICI CURIAE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, MONTANA, SHOSHONE TRIBE OF THE WIND RIVER INDIAN RESERVATION, WYOMING, AND STANDING ROCK SIOUX TRIBE OF NORTH AND SOUTH DAKOTA IN SUPPORT OF APPELLEES

REID PEYTON CHAMBERS
HARRY R. SACHSE
SONOSKY, CHAMBERS & SACHSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 331-7780

Washington, D.C. • THIEL PRESS • (202) 638-4521

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*Japan Line, Ltd. v. County of Los Angeles*, 47 U.S.L.W. 4477 (April 30, 1979) . . . . . 15

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*McClanahan v. Arizona State Tax Comm.*, 411 U.S. 164 (1973) . . . . . 17, 19, 20, 29

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*Morris v. Hitchcock*, 194 U.S. 384 (1904) . . . . . 5, 23, 26, 28



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*Cases, continued:*

*Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959) . . . . . 5, 8, 9

*Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949) . . . . . 18

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Opinion of the Solicitor, October 13, 1976, *Tribal Jurisdiction over non-Indians in Civil Matters: Approval of Various Ordinances of the Crow and Shoshone-Bannock Tribes* . . . . . 28

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## INTEREST OF AMICI

This brief is submitted with the written consent of all parties to the case, lodged with the Clerk. See Rule 42(2) of the Rules of this Court. *Amici*, three major Indian

tribes, are interested in this case to protect their governmental authority to tax transactions involving Indian commerce on their reservations and to protect tribal enterprises from injury and destruction by state taxation.

## QUESTION PRESENTED

Whether a state may validly tax sales by Indian retailers to non-Indian purchasers where the sales are made on trust land within an Indian Reservation, the Tribe has also taxed and regulated the transaction, and the United States has licensed the seller?

## STATEMENT

### I. Introduction

These consolidated cases were brought by the United States and four Indian tribes against the State of Washington to enjoin imposition of various state taxes upon Indians and non-Indians on Indian reservations. The three-judge district court generally granted the relief sought.

*Amici* will address only one issue on appeal – whether a state may validly tax sales by Indian retailers, licensed by both the United States and the tribe, to non-Indian purchasers where the tribe has also taxed and regulated the transaction.[1] *Amici* submit that the state sales and excise taxes upon this type of transaction are invalid

[1]The state agrees that this "is the most crucial issue in this case" (St. Br. p. 54). *Amici* submit that the present case differs from *Confederated Salish & Kootenai Tribes v. Moe*, 425 U.S. 463 (1976) because the tribes tax and regulate these transactions. See particularly Part IIB, *infra*.

*Amici* will not consider the validity of state excise taxes on motor vehicles, motor homes, campers or trailers or the validity of the State's general retail sales tax where no tribal tax is imposed (at issue in the Yakima case). *Amici* also assume that the appeals are within the jurisdiction of this Court.



under Article I, §8, cl. 3 of the United States Constitution because they interfere with commerce with the Indian tribes.

### II. Statement of Facts

Three of the four Indian tribes in this case – the Colville, Lummi and Makah – operate tribally owned businesses selling cigarettes and tobacco products on their reservations. These businesses commonly sell other goods as well – such as handicrafts, groceries and sundries – but this appeal concerns only state taxation of sales of tobacco products. The tribes purchase the tobacco products wholesale with tribal funds held in trust for them by the United States. All the tribal outlets operate on trust land within the reservations.

Each tribe imposes a uniform tax on all sales of cigarettes and tobacco products, whether to Indians or non-Indians. The tribes also regulate the manner in which cigarettes are sold on the reservation. For example, sellers must carry liability insurance,[2] may sell only a limited amount of tobacco products to non-Indians,[3] and must refrain from selling to minors.[4]

Each tribal tax supplies substantial tribal revenues – found by the district court to be $265,760 to the Colville Tribe, $54,440 to the Lummi Tribe, and $13,490 to the Makah Tribe annually (446 F. Supp. at 1347). Each reservation was found by the district court to be "isolated and underdeveloped," with high unemployment and with most goods and services located off the reservation. The district court also found that tribal tax revenues are

[2]E.g., Colville Ordinance, Appendix, pp. 104-110, §19.

[3]*Id.*, §13.

[4]*Id.*, §14.

used to fund tribal programs to stimulate economic development, and provide for reservation health needs, education and social welfare. (*Id.* at 1346.)

In a different fashion, the Yakima Tribe also taxes cigarettes and tobacco products sold on its reservation. The Tribe purchases cigarettes wholesale and resells them to dealers licensed by it at a one-cent per carton mark-up. At the time of resale, the Tribe also imposes a permit fee on the dealer of 22.5 cents per carton. The district court found that the Yakima Tribe derives approximately $278,000 annually from this fee. (446 F. Supp. 1368-1369.)

For the Colville, Lummi and Makah Tribes, the district court found that "nearly ninety percent of the Tribes' sales are made to non-Indians" and that if the state tax were imposed "the cigarette sales commerce between the Tribes and non-Indians would be destroyed" (*id* at 1347). The court below also found that a majority of the sales by the Yakima Tribe are to non-Indians and that this Tribe's "tribal cigarette enterprises would be destroyed" if the state sales tax were allowed (*id* at 1369). This is because demand for cigarettes is price-elastic, and the price of cigarettes to non-Indians (if they are required to pay both state and tribal taxes on purchases from the tribes) would substantially exceed the price paid by non-Indian purchasers to non-Indian retailers off the reservation where there is no liability for the tribal tax.[5] The state itself acknowledges that, in order to continue operation, these tribal tobacco outlets all require immunity from state taxes on their sales to non-Indian customers. This is necessary to compensate for their "locational disadvantages" of "being remote from markets." (St. Br., pp. 20-21, testimony of expert economist).

[5]The state concedes that its tax would have this effect. St. Br., p. 69.



## SUMMARY OF ARGUMENT

Paramount federal law precludes state taxation which would destroy Indian commerce between Indian tribes and non-Indians. The effect of the state taxes challenged here is to destroy Indian commerce and provide a direct commercial advantage to non-reservation businesses. This is unlawful. *Boston Stock Exchange v. State Tax Comm.*, 429 U.S. 318 (1977); *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450 (1959).

This case is distinguishable from *Confederated Salish & Kootenai Tribes v. Moe,* 425 U.S. 463 (1976). In *Moe,* the tribe did not impose a tax on sales by Indian retailers; Indian and local commerce were thus treated equally by imposition of the state tax in that case. Also, the retailer had not secured a federal Indian trader's license, and the United States had not subjected his business to its comprehensive Indian trading regulations. Collision between federal regulation and state law – absent in *Moe* – is present here. *Warren Trading Post v. Arizona State Tax Comm.*, 380 U.S. 685 (1965).

Finally, Indian tribes have long been recognized as having power to tax non-Indians who enter the reservation to do business with Indians. E.g., *Morris v. Hitchcock,* 194 U.S. 384 (1904). A virtually unbroken line of cases, administrative decisions and the understanding of Congress when it enacted the Indian Reorganization Act, 25 U.S.C. 461, 476, confirm the existence of this power.

## ARGUMENT

The present case deals specifically with tribal and state power to tax sales of tobacco by tribal enterprises to non-

Indians. Tobacco, of course, was the subject of the earliest commerce between Indians and non-Indians in America. Broad issues concerning Indian commerce with non-Indians and tribal economic betterment are at stake in this appeal. At stake is whether tribes will maintain their authority to control tribal enterprises and to guide and protect economic development on their reservations. In the modern society, development on Indian reservations must inevitably enlist significant non-Indian involvement – be it non-Indian talent and technicians, non-Indian capital investment or non-Indian customers. No Indian tribe is or can be entirely self-sufficient in its development efforts. This case involves a state action which – if allowed – would thwart a particular tribal economic development project.

*Amici* submit that paramount federal law precludes state taxation where the effect of that taxation is to destroy commerce between an Indian tribe and non-Indians on trust lands within an Indian reservation. At issue here is no artificial "tax haven"[6] nor any gimmick to "market" an Indian tax exemption to non-Indians.[7] Rather, this case concerns whether an important avenue of constitutionally-protected commerce between Indians and non-Indians – a source of greatly needed revenue, jobs and income for economically underdeveloped Indian tribes – can be shackled by state taxation.

"Commerce . . . with the Indian tribes" of course is subject to the plenary regulatory power of Congress under Art. I, §8, cl. 3, of the Constitution. Like interstate commerce and commerce with foreign nations, commerce with Indian tribes has always been the subject of

[6] St. Br., p. 68, 85, 88.

[7] St. Br., p. 58, 65-68, 72, 73, 83, 90, 91.



comprehensive and paramount federal authority. State taxation of Indian commerce has accordingly been strictly limited by numerous decisions of this Court.

In Part I of this Argument, we will analyze the Indian commerce involved as if it were only entitled to the same constitutional protection from state taxation as interstate commerce. In Part II, we answer the two principal arguments the State advances to support its scheme. Part III suggests that Indian commerce is in fact more comprehensively protected against state taxation than is interstate commerce. And in Part IV, we discuss tribal authority to tax non-Indians.

## I.

## THE STATE SALES AND EXCISE TAXES ARE UNCONSTITUTIONAL BECAUSE THEY WOULD INFRINGE UPON – INDEED, DESTROY – COMMERCE WITH INDIAN TRIBES

Our "starting point" is the well-established proposition that "the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman v. Hewit,* 329 U.S. 249, 252 (1946); *Boston Stock Exchange v. State Tax Comm.,* 429 U.S. 318, 328 (1977). For example, in *Boston Stock Exchange, supra,* this Court invalidated an amendment to New York's tax laws designed to protect the New York Stock Exchange from out-of-state competition. Prior to the amendment, New York had long taxed all transactions in securities where any one of several events – the sale, agreement to sell, or delivery or transfer of certificates – took place in the state. Other states where stock exchanges were located imposed no comparable transfer tax. To protect the New York Stock Exchange from out-of-state competition, the New York legislature amended

its law in two respects to reduce the tax where the sales of stock took place in New York.

Relying on language in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959), this Court held that "no State may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business.' " 429 U.S. at 329. The Court considered the practical effect of the changed tax, observing that:

> "Prior to the 1968 amendment, the New York transfer tax was neutral as to in-state and out-of-state sales. An in-state transfer or delivery of securities triggered the tax and the burden fell equally on all transactions regardless of the situs of sale. Thus, the choice of an exchange for the sale of securities that would be transferred or delivered in New York was not influenced by the transfer tax; wherever the sale was made, tax liability would arise. The flow of interstate commerce in securities was channeled neither into nor out of New York by the state tax.
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> * * *
>
> "The obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges. Rather than "compensating" New York for a supposed competitive disadvantage resulting from §270, the amendment forecloses tax-neutral decisions and creates both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States."

(*Id* at 330-331)

In the present situation, as in *Boston Stock Exchange*, federally-protected commerce is discouraged vis-a-vis local



(i.e., commerce with dealers outside the reservation) commerce – even though here the tax is not discriminatory on its face. This is because purchasers of cigarettes from "local" (non-reservation) sellers pay only the state tax. Purchasers of cigarettes in Indian commerce pay both state and tribal taxes.[8] To paraphrase this Court's holding in *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 70 (1963), "the conclusion is inescapable: equal treatment for . . . taxpayers" purchasing from tribal sellers on the reservation and from non-Indian sellers outside the reservation and not subject to tribal taxation "is the condition precedent for a valid" state sales tax on purchasers of the Indian commerce.

The district court found and the state concedes that the practical effect of the state tax would be to destroy the Indian commerce. In the present case, discrimination is apparent, and in no way conjectural.

Moreover, in the present case and unlike cases like *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)[9] and *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), the State has not even attempted fairly to apportion its tax, nor has it sought to impose a fairly apportioned compensatory use

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[8] The necessary premise of our argument is that Indian tribes have the authority to levy the taxes in question. This premise is discussed in Part IV *infra*.

[9] In *Complete Auto Transit*, the Court stated that a state tax on interstate commerce will be sustained:

> "* * * when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." (*id.* at 279)

tax on the use outside the reservations of articles purchased from the tribes. It has thus chosen the taxing alternative most destructive of tribal commerce and tribal government. *Amici* here take no position on whether a fairly apportioned tax would be lawful, since that issue is not presented by this record. Clearly, in the absence of apportionment, Indian commerce is discriminated against – indeed, destroyed, as the district court found – and local business is given a "direct commercial advantage."

## II.
## THE STATE'S ARGUMENTS ARE UNPERSUASIVE

### A. Multiple burdens of state and tribal taxation are not permissible on Indian commerce.

The State seeks to avoid the above argument by contending that it *may* impose a double tax burden on interstate as well as Indian commerce. As an example, it asserts that it may lawfully "tax its citizens with respect to in-state use or consumption of cigarettes purchased" out-of-state, without giving a credit for the out-of-state sales tax. (St. Br., p. 62.)

That is not the law. In the case relied on by the State, *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), the Court repeatedly emphasized that interstate commerce could be subjected to a total tax burden *equal* to that imposed on local commerce. Speaking for the Court, Mr. Justice Cardozo emphasized:

> "Equality is the theme that runs through all the sections of the statute * * * * No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere." *Id* at 583-584.



The Court carefully emphasized in *Henneford* that a use tax must be non-discriminatory as applied to interstate commerce. Summarizing this and the later cases on the subject, Professor Laurence Tribe has written:

> *"[T]he Court has consistently struck down those state taxes which it concludes unjustifiably benefit local commerce at the expense of out-of-state commerce."* L. Tribe, American Constitutional Law, 354-355 (1978) (emphasis in original).

In *Bryan v. Itasca County*, 426 U.S. 373, 388, n.14 (1976), this Court spoke to the dangers of multiple layers of taxation in the Indian context:

> "Much has been written on the subject of a devastating impact on tribal governments that might result from an interpretation of §4 as conferring upon state and local governments general civil regulatory control over reservation Indians . . . (citations omitted). The suggestion is that since tribal governments are disabled under many state laws from incorporating as local units of government, . . . (citation omitted) general regulatory control might relegate tribal governments to a level below that of counties and municipalities, thus essentially destroying them, *particularly if they might raise revenue only after the tax base had been filtered through many governmental layers of taxation.*" (emphasis supplied)

The Court in *Bryan* accordingly invalidated the regulations involved. The State offers no special justification for its multiple taxation here, and none appears on this record.

**B. Confederated Salish & Kootenai Tribes v. Moe is distinguishable.**

The State incorrectly urges that *Confederated Salish & Kootenai Tribes v. Moe*, 425 U.S. 463 (1976), would be "meaningless"[10] if *Amici's* position is adopted. The present case is distinguishable from *Moe* in two separate and important respects. First, the tribe in *Moe* had not adopted and the Secretary of the Interior had not approved a tribal tax on those transactions. The state tax in *Moe* did not therefore disfavor Indian commerce as against local commerce, or infringe upon a federally approved tribal taxing and regulatory program. Second, the individual Indian retailer in *Moe* had neither sought nor obtained a federal Indian traders license. Thus, direct collision between the state tax and the comprehensive federal regulatory scheme was absent in *Moe*.

Approval of tribal taxing ordinances and federal licensing and regulation of Indian traders are no "mere stroke[s] of a pen" concocted simply to circumvent *Moe*, as the State suggests.[11] The opposite is true.[12] Unlike *Moe*, there is here substantial positive federal legislative and executive implementation of the Indian Commerce Clause, asserting federal control over and support for important tribal economic development activities.

[10] St. Br., p. 54.

[11] St. Br., p. 74.

[12] Indian tribes well know that Interior Department approval of tribal ordinances is anything but an empty formality. Ordinances of *Amici* are often disapproved by the Department, or returned to the tribe with approval conditioned on specified modifications. Securing approval of tribal ordinances frequently requires prolonged negotiation with Interior officials over the content and language of an ordinance.



The state tax here would directly frustrate these federal actions by destroying the authorized tribal activities.

*Amici* submit that this case is directly analogous to *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965). In *Warren Trading Post*, the Court held the state preempted by comprehensive federal regulatory action from imposing its gross receipts tax on the retail business of a federally licensed *non-Indian* trader on the Navajo Reservation. The Court emphasized that

> "* * * from the very first days of our Government, the Federal Government has been permitting the Indians largely to govern themselves, free from state interference, and had exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes." 380 U.S. at 686-688 (footnotes omitted).

As the Court observed in *Warren*, continuously since the first Congress in 1790, federal statutes have controlled all aspects of Indian trading. In place of the federal silence and passivity in *Moe*,[13] there is specific federal preemption present here.

*Amici* are aware, of course, that this Court stated in *Moe*, 425 U.S. *supra* at 482, that *Warren* did not preclude state taxation of Indian cigarette sales to non-Indians. As applied to the facts of that case, that statement is of course true. The present case, however, is exactly the same as *Warren Trading Post*, except that the non-Indian is the buyer and a tribal enterprise is the seller. In each case, the legal incidence of the state tax falls on the non-Indian, and *Amici* submit that it should make no differ-

[13] By contrast, the United States did not appear in any capacity in *Moe*.

ence whether the non-Indian is seller or buyer.[14] The comprehensive Indian trading statutes have always controlled persons buying articles from Indians (such as furs in the early days) as well as persons selling to them.[15] Commerce means buying and selling. Selling free of state taxation is at least as important to Indians as buying free of state taxation. Absence of state taxation in buying saves a small amount for each Indian purchaser. Absence of state taxation is selling allows Indian commerce to function, creating jobs and income.[16]

Nor can it matter that *Warren Trading Post* involved a gross income tax rather than sales and excise taxes. The effect of the state taxes here would be even more disruptive of tribal trade than the tax in *Warren* because this taxation would effectively destroy an avenue of Indian commerce.

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[14] In *Moe*, this Court observed that "there was in Warren no claim that the State could not tax that portion of the receipts attributable to on-reservation sales to non-Indians." Id. at 482. On the facts of *Warren*, which involved a non-Indian seller, there could of course be no objection to the state's taxing his sales to non-Indians, for no Indian commerce would be involved.

[15] For example, 25 U.S.C. 263 – derived from nineteenth century acts – authorizes prohibition of all trade, or trade in certain commodities, in Indian country. Indian trading is also the subject of extensive Interior Department regulations, 25 CFR Parts 251 and 252.

This means that the federal executive (not the states) can prohibit or condition certain kinds of commerce between Indians and non-Indians seen as injurious to federal Indian relations or policy, or to the relationship between Indians and non-Indians.

[16] For example, if states can tax non-Indians doing business with Indians on reservations, Indian tribes cannot offer non-Indians business tax incentives to locate there or to joint venture development projects on reservations. The offering of such favorable tax incentives is a major device open to state, county and local governments. The State's position would deny this option to Indian tribes, the poorest of American governments.



## III.

## INDIAN COMMERCE IS ENTITLED TO MORE COMPREHENSIVE PROTECTION UNDER THE COMMERCE CLAUSE THAN IS INTERSTATE COMMERCE.

The previous two parts, we think, have demonstrated that this tribal commerce – were it interstate commerce – would in these circumstances be shielded from the state taxes imposed. But if the Court should reject that argument, *Amici* submit that state power to tax Indian commerce is narrower than where interstate commerce is involved.

### A. The purpose of the Indian commerce clause is protective.

In *Japan Line, Ltd, v. County of Los Angeles,* 47 U.S.L.W. 4477, 4480 (April 30, 1979), this Court recently rejected the notion that "Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved" and required "more extensive constitutional inquiry" where states seek to tax foreign commerce. The constitutional inquiry centers around the purpose of each component of the Commerce Clause. The chief purpose of the interstate commerce clause is to require equality in each state's treatment of its own commerce and that of its sister states. A free trade zone is established. Protectionist measures are prohibited. By contrast, the purposes of the Indian commerce clause are different. The very reason for the clause is to protect Indians and Indian commerce. In *United States v. Forty Three Gallons of Whiskey,* 93 U.S. 188, 194 (1876), this Court contrasted the power of Congress and the states over Indians under the Articles of Confederation and the Constitution. It observed that in the Articles: "* * * two limitations were placed upon the power of Congress over Indian affairs: the Indians must not be members of any

State, nor must Congress do anything to violate or infringe the legislative right of a State within its own limits." The Court concluded that:

> "of necessity, these limitations rendered the power of no practical value. This was seen by the Convention which framed the Constitution * * *: The only efficient way of dealing with the Indian Tribes was to place them *under the protection of the General Government.* Their peculiar habits and character required this; * * *."

*Ibid* (emphasis supplied).

Thus, state control over Indian commerce under the Articles was replaced by the Constitution which "provid[ed] that intercourse and trade with the Indians should be carried on solely under the authority of the United States," *ibid.* The State's taxation here would return to the rejected provisions of the Articles, ignoring the protective purpose recognized by this Court as the basis of the Indian Commerce clause.

**B. The Indian commerce power is similar to the foreign commerce power.**

In *United States v. Forty-Three Gallons of Whiskey,* 93 U.S. 188, 194 (1876), this Court observed that the "power to regulate commerce with the Indian Tribes . . . [is] as broad as that to regulate commerce with foreign nations."[17] Like foreign commerce, Indian commerce involves political relationships which have from the beginning always been peculiarly the province of the federal government. As with state taxation of foreign commerce, the Indian commerce cases have adhered to the standard that there must be "no detraction whatever from . . . sov-

[17]The Indian commerce power has always been viewed as "much broader than the power over commerce between states." FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW, pp. 91 (G.P.O. 1942).



ereignty" as a result of the state tax or regulation. Compare *Bob-Lo Excursion Co. v. Michigan,* 333 U.S. 28, 36 (1948) with *Williams v. Lee,* 358 U.S. 217, 221 (1958):

> "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."

*Amici* submit that this Court's decisions in the field of state taxation and regulation of Indian commerce have generally recognized the above congruence between Indian and foreign commerce. State action has been permitted *only* when it is clear that there will be no inferference either with federal purposes and policy or with the sovereignty of Indian tribes. More specifically, the Court's decisions have allowed state taxation of non-Indians engaged in Indian commerce only where no burden or a "minimal burden" is imposed, *Confederated Salish & Kootenai Tribes v. Moe,* 425 U.S. 463, 483 (1976), or where the effect of the tax on the Indians is "remote and indirect." *Thomas v. Gay,* 169 U.S. 264, 273 (1898) (territorial tax). Otherwise, state taxation of Indian commerce with non-Indians[18] has been precluded. As the Court observed in *McClanahan v. Arizona State Tax Comm.,* 411 U.S. 164, 179 (1973),[19] "both the tribe

[18]No interference with Indian commerce, of course, is presented if a state taxes non-Indians engaged in commerce with other non-Indians on a reservation. Cf. *Draper v. United States,* 164 U.S. 240 (1896).

[19]*McClanahan,* on its facts, involved state taxation of Indians. But the State is simply wrong to suggest that the Court's test in *Williams v. Lee, supra* – that state action is invalid if it infringes "on the right of reservation Indians to make their own laws and be ruled by them" – is applicable only where the state seeks to tax "*reservation Indians.*" St. Br., p. 67. This Court said *precisely the*

[footnote continued]

and the state could fairly claim an interest in asserting their respective jurisdictions" over transactions involving both Indians and non-Indians. The Court held state taxation and regulatory authority permitted only "up to the point where tribal self-government would be affected."[20] *Ibid.*

This standard controls here. The only case where the Court has permitted state taxation of non-Indians engaging in Indian commerce where there might arguably have been more than a minimal impact on Indian commerce or tribal government is *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949).[21] There the Court permitted the State to impose a production tax on oil and gas extracted by a non-Indian mineral lessee of allotments held in trust by the United States "for various members of the Pottawatomie, Apache, Comanche and Otoe and Missouria Tribes." *Id.* at 344. In *Texas Co.*, the Court overruled

*opposite* in *McClanahan*, 411 U.S. at 179 (1973): "It must be remembered that cases applying the Williams test have dealt principally with situations involving non-Indians." See also *Fisher v. District Court*, 424 U.S. 382, 386 (1976).

[20] In the criminal area, state jurisdiction is allowed *only* where neither the accused nor the victim of a crime is Indian. *United States v. Antelope*, 430 U.S. 641, 643-644 and notes 2 and 4 (1977); *Draper v. United States*, 164 U.S. 240 (1896); 18 U.S.C. 1152-1153. If an Indian is involved in the crime either as accused or victim, federal and tribal jurisdiction are exclusive.

[21] Another case cited by the State (St. Br. p. 61) as supporting state taxing authority over non-Indians on reservations – *Utah & Northern Ry. v. Fisher*, 116 U.S. 28 (1885) – is inapposite because it did not involve commerce with Indians. In *Fisher*, the Territory of Idaho was permitted to impose a tax on the property of a railroad over lands once owned by Indians. The Indians had *ceded* the lands over which the railroad was constructed and Congress had by statute granted them to the company in fee. The lands were not part of the reservation area and the railroad was not engaged in any commerce with the Indians which could be infringed by the state tax.



prior case law which held non-Indian lessees of Indian lands to be automatically exempt from state property taxes on the ground that they were "federal instrumentalities." The Court did not consider the impact of the taxes on either Indian commerce or tribal self-government. In any event, it is unlikely that there was a significant adverse impact on either Indian commerce or government in that case. The leased lands were allotted, not tribal, lands on reservations which did "not possess the usual accoutrements of tribal self-government." *McClanahan*, 411 U.S. *supra* at 167-168; see *Oklahoma Tax Comm. v. United States*, 319 U.S. 598 (1943); *Tooisgah v. United States*, 186 F.2d 93, 97-98 (C.A. 10, 1950).

Far more than a "minimal burden" or a "remote and indirect" effect on Indians would follow from the state taxation at issue in this case. The "point where tribal self-government would be affected" has clearly been passed. As the district court found, imposition of state taxes here would destroy the Indian commerce involved,[22] and the tribes would lose control over reservation economic development.[23]

[22] The State is simply wrong to assert that "the nature and extent of the Tribe's tax base . . . has nothing to do with the relation between the Tribe and its members" and "the establishment of tribal enterprises designed primarily to cater to non-Indians has nothing to do with the relation between the Tribe and its members." St. Br., p. 70. The contrary is true: tribal commerce with the relatively more affluent non-Indian community is an essential avenue for economic betterment of the tribes' members.

[23] Conceding that Indian commerce would be "discourage[d], if not entirely eliminate[d]" by its taxes (St. Br., p. 69), the State callously argues that its eradication of Indian commerce is lawful so long as the Tribe is not rendered "unable to govern their members." *Ibid.* The critical questions are whether tribal government is "affected," not whether it is destroyed, whether a promising tribal economic development program will be thwarted, not whether tribal government can manage to function in some fashion despite the tax.

## IV.

### TRIBES HAVE THE POWER TO TAX NON-INDIANS PURCHASING GOODS FROM INDIANS ON RESERVATION TRUST LANDS.

A premise of our argument in the preceding sections is that tribes have power to impose a tax on sales by Indians to non-Indians on trust land within the reservation. "It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve"[24]: the tribes are not claiming power to tax transactions entirely between non-Indians,[25] or transactions occurring outside a reservation[26] or on lands within reservation boundaries owned in fee by non-Indians. The transactions sought to be taxed here arise on the tribe's own trust lands and clearly involve and affect Indians.

The governmental status of Indian tribes is well established and has been repeatedly confirmed by this Court. E.g., *United States v. Wheeler*, 435 U.S. 313 (1978); *United States v. Mazurie*, 419 U.S. 544, 557 (1975). This Court has, of course, also made it clear that tribal governmental authority is not absolute or unlimited. Its extent was recently summarized by the Court in *Wheeler, supra*, at 323:

> "Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty.' *United States v. Kagama, supra*, at 381. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers: by statute, in the exercise of its plenary control, Congress has removed still others.
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> "But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . . [They] are a good deal more than 'private, voluntary organizations.' *United States v. Mazurie*, 419 U.S. 544, 557; see also *Turner v. United States*, 248 U.S. 354, 354-355; *Cherokee Nation v. Georgia, supra*, at 16-17. The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. *In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.* See *Oliphant v. Suquamish Indian Tribe*, ante." (emphasis supplied)

Since no treaty or statute has retracted tribal power to tax transactions between Indians and non-Indians, the issue is whether this power has been "withdrawn by . . . implication as a necessary result of [the tribes'] dependent status." In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court concluded that tribal criminal jurisdiction over non-Indians *had* been implicitly withdrawn by Congress. *Oliphant*, however, does not impeach the long-established tribal taxing authority over non-Indians engaged in commerce with Indians where no

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[24] *McClanahan v. Arizona Tax Comm.*, 411 U.S. 164, 167 (1973).

[25] E.g., *Draper v. United States*, 164 U.S. 240 (1896).

[26] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962).

criminal penalties are imposed. Indeed, the Court's analysis in *Oliphant* supports tribal taxing power in the circumstances presented by this case.

In *Oliphant*, the Court relied heavily on the "commonly shared presumption of Congress, the Executive Branch and lower federal courts that tribal courts do not have the power to try non-Indians. . . ." *Id.* at 206. The Court discussed opinions of the Attorney General in 1834 and 1855[27] holding that tribes had no criminal jurisdiction over non-Indians, and a later opinion by the Solicitor of the Interior Department reaching the same conclusion. The few prior judicial decisions on the subject also held tribal criminal authority over non-Indians precluded. Most importantly, the Court pointed out that Congress had recurrently in its consideration of Indian legislation spanning two centuries acted on the assumption that Indian tribes did not possess power over non-Indian criminal defendants.

The history of congressional, executive and judicial treatment of tribal power to tax non-Indians who enter the reservation to do business with Indians[28] is precisely

[27]The 1855 Attorney General's opinion which denies tribal criminal jurisdiction over non-Indians holds that the tribe in question *retained* civil authority over non-Indians. 7 Ops. Atty. Gen'l 174 (1855).

[28]The Court in *Oliphant* cited two other instances where tribes lost governmental power by necessary implication from their dependent status – the power to dispose of their lands to for-

[footnote continued]



the opposite: this tribal power has long been sustained in virtually every situation where it has been considered.

**A. Judicial treatment.**

Every case to consider the specific question, except one recent unreported district court decision now on appeal,[29] has upheld tribal power to tax non-Indians. This Court's early decision in *Morris v. Hitchcock*, 194 U.S. 384 (1904),[30] sustained a tax imposed by a tribal ordinance upon non-members for the privilege of grazing cattle on reservation lands.[31] Contemporaneous with *Morris*, a court of appeals held that a tribe could lawfully require outsiders to pay a permit tax, or license fee, as a condition precedent to non-Indians doing business with Indians on the reservation. *Buster. v. Wright*,

eign sovereigns or to form political connections with foreign governments. *Id.* at 209. Clearly, neither is involved here.

[29]*Merrion v. Jicarilla Apache Tribe*, No. 78-1154, C.A. 10 (argued May 17, 1979). *Merrion* is, in part at least, distinguishable from our situation since in that case the district court considered that a statute, 25 U.S.C. 398, which specifically authorized states to tax oil and gas royalties received by tribes, had preempted any concurrent tribal authority.

[30]*Morris* was cited with approval by the Court in *Oliphant*, 435 U.S. *supra* at 206.

[31]An Attorney General's opinion twenty years before *Morris* had upheld the tribe's authority to issue and require the licenses involved there, stating:

> "In the absence of treaty or statutory provisions to the contrary, the Choctaw and Chickasaw Nations have power to regulate their own right of occupancy, and to say who shall participate therein and upon what conditions; and hence may require permits to reside in the nation from citizens of the United States, and levy a pecuniary exaction therefor."

18 Ops. Att'y Gen'l 34 (1884)

135 Fed, 947 (C.A. 8, 1905), appeal dismissed, 203 U.S. 599 (1906). The court stated:

> "The authority of the Creek Nation to prescribe the terms upon which non-citizens may transact business within its borders did not have its origins in any act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. . . . The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by Act of Congress or by the contracts of the Creek Tribe itself."[32]

This Court dismissed the appeal in *Buster* on the merits, and costs were taxed to the appellants.

The issue of tax jurisdiction next appears in two courts of appeals decisions in the 1950's concerning a tribal tax on non-Indian lessees grazing livestock on individual trust allotments. In *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 99 (C.A. 8, 1956) the court of appeals, citing *Buster v. Wright*, held that the tribe had given "orderly implementation" to its power to tax non-members:

> ". . . through the adoption of a constitution which, among other things, has specifically provided for the levy of taxes. Such action was taken in accordance with the provisions of the Indian Reorganization Act, 1934, . . . .
>
> We conclude from the original precept of tribal sovereignty and the fact that the power of the Oglala Sioux Tribe to impose the tax or license in question has not been pretermitted by any federal statute or agency ruling thereunder, but, to the contrary, has been implemented by the Indian Reorganization Act, supra, that such power still exists."

[32] Accord: *Maxey v. Wright*, 54 S.W. 807 (Ct. Ap. Indian Terr 1900), aff'd 105 Fed. 1003 (C.A. 8, 1900).



The same result was reached in *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (C.A. 8, 1958), *cert. denied*, 358 U.S. 932 (1959).

The State and various electrical power companies as *amicus curiae* seek to distinguish these cases as sustaining only a proprietary, treaty right of the tribes in question to exclude non-Indians from tribal lands rather than affirming tribal governmental power over non-Indians.[33] Of course, even if this distinction were valid, the tribes all own the lands where the sales take place in this case. But the proposed distinction is clearly refuted by the facts of the prior cases. For example, *Buster v. Wright* involved a tax imposed on owners of *fee lands*, not tribal lands. Similarly, *Iron Crow* concerned the power of a tribe, confirmed by a federal statute, to tax non-Indian

[33] State Br., pp. 76-79; Brief of Salt River Project and others (hereafter "SRP Brief") as *amicus curiae*, pp. 15-22.

lessees of lands *allotted to individual Indians.*[34] In neither case did the tribe have any "proprietary" rights in the lands where the taxed activities of the non-Indians occurred.[35]

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[34]The Salt River Project brief acknowledges the inapplicability of its analysis to *Iron Crow* and *Barta*, but lamely argues that the court in those cases "missed the governmental/proprietary distinction." SRP Br., p. 20.

[35]The Salt River Project brief persistently misstates the teaching of Felix Cohen's monumental Indian law treatise. The treatise does not "acknowledge that *Morris v. Hitchcock* and its descendants were based upon the proprietary power to exclude nonmembers, and not tribal self-government. F. Cohen, *Federal Indian Law*, 266-67." (SRP Br., p. 22).

At the portion of the treatise cited, Cohen states that:

> "Though the scope of the power (of tribes) as applied to nonmembers is not clear, it extends at least to property of nonmembers used in connection with Indian property as well as to privileges enjoyed by nonmembers in trading with the Indians.[123] The power to tax nonmembers is derived in the cases from the authority, founded on original sovereignty and guaranteed in some instances by treaties, to remove property of nonmembers from the territorial limits of the tribe. Since the tribal government has the power to exclude, it can extract a fee from nonmembers as a condition precedent to granting permission to remain or to operate within the tribal domain.[124] (emphasis supplied)

The footnotes cite *Morris*, *Buster v. Wright* and later cases.

Mr. Cohen was "an acknowledged expert in Indian law," *Squire v. Capoeman*, 351 U.S. 1, 8-9 (1956). He clearly believed tribes had power to tax non-Indians within "the territorial limits of the tribe" who engaged in "trading with the Indians." See also Cohen, *Indian Rights and the Federal Courts*, 24 Minn.L.Rev. 145 (1940). His analysis, plain on its face, is misstated by the Salt River Project's brief.



**B. Congressional and executive treatment.**

The Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq*, supports tribal authority to tax non-Indians engaging in reservation commerce with Indians. Section 16 of that Act, 25 U.S.C. 476, authorizes Indian tribes to organize and adopt a constitution, and provides that:

> "*In addition to all powers vested in any Indian tribe or tribal council by existing law*, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: * * *" (emphasis added).

Although the 1934 Reorganization Act does not expressly confer taxing power on tribes,[36] the Interior Solicitor in an opinion contemporaneous with the act held that tribes organizing under the Act could adopt constitutions authorizing taxation of members and non-members because this was a power tribes already held under existing law.[37] *Powers of Indian Tribes*, 55 I.D. 14,

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[36]When the Indian Reorganization Act was before the Senate, the Commissioner of Indian Affairs submitted a detailed legal memorandum concerning the power of Congress to authorize tribes "to levy assessments and taxes," in which *Buster v. Wright* was cited and discussed. *Hearings Before the Committee on Indian Affairs, United States Senate, on S.2755 and S.3645*, "To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise" 73rd Cong., 2d Sess., Part 2, pp. 268-270 (1934).

[37]For this reason, the court below correctly reasoned that, whether or not a tribe is organized under the 1934 Act, it retains taxing authority over non-Indians in these circumstances (446 F. Supp. at 1361).

46-50 (1934). The Solicitor's opinion reasoned that tribes have these powers inherently, citing *Morris v. Hitchcock, supra,* and *Buster v. Wright, supra.* This has continued to be the view of the Interior Department. E.g., Opinion of Solicitor, October 13, 1976, *Tribal Jurisdiction over Non-Indians in Civil Matters: Approval of Various Ordinances of the Crow and Shoshone-Bannock Tribes.*[38] It has also been the longstanding view of the Attorney General.[39] Finally, the Interior Department has consistently approved tribal constitutions which contain the power to tax the privilege of doing business within the reservation.

Congress thus at least implicitly confirmed tribal taxing power by the Indian Reorganization Act, and the executive has so implemented the Act. Congress has certainly not recurrently legislated with an assumption that tribes lack the power to tax non-Indians. In contrast to the criminal area,[40] Congress has not moved to extend federal taxing authority, impose civil regulations or afford federal court jurisdiction over commercial transactions between Indians and non-Indians in Indian country.

The tribes in this case do not seek to tax non-Indian activities on reservations which do not involve Indian

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[38]We have lodged a copy of this unpublished opinion with the Clerk of the Court.

[39]See notes 27 and 31, *supra.*

[40]Congress has often differentiated between criminal and civil jurisdiction in legislation affecting Indian tribes. For example, in the Indian Civil Rights Act, 25 U.S.C. 1301 *et seq,* Congress provided for federal court habeas corpus review of tribal court convictions while leaving civil suits entirely to tribal courts. E.g., *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). See also 7 Ops. Att'y Gen'l 174 (1855), discussed *supra,* n.27.



commerce or affect Indians. Their power to tax non-Indians engaged in commercial transactions with Indians on reservations is well established by previous case law and executive and congressional action and should not be disturbed. This Court should reaffirm tribal taxing jurisdiction where non-Indian activities affect Indians, and lay to rest any question that *Oliphant* upset prior precedent and settled expectations in this area. As the Court stated in *McClanahan,* 411 U.S. *supra* at 179, tribes can "fairly claim an interest in asserting * * * jurisdiction" over transactions involving both Indians and non-Indians.

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

REID PEYTON CHAMBERS
HARRY R. SACHSE
SONOSKY, CHAMBERS & SACHSE
2030 M Street, N.W.
Washington, D.C. 20036
(202) 331-7780

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON, *et al.*,
*Appellants,*

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; AND MAKAH INDIAN TRIBE,
*Appellees.*

## BRIEF OF AMICI CURIAE

**National Congress of American Indians, Inc.,**
**Seminole Tribe of Florida,**
**Las Vegas Indian Colony,**
**Reno-Sparks Indian Colony, and**
**Sisseton-Wahpeton Tribe of South Dakota**

*Of Counsel*:

STEPHEN H. WHILDEN
Hollywood, Florida

PETER J. SFERRAZZA
Reno, Nevada

BERTRAM E. HIRSCH
Belle Rose, New York

WILKINSON, CRAGUN & BARKER
GLENN P. SUGAMELI
Washington, D.C.

CHARLES A. HOBBS
1735 New York Avenue, N.W.
Washington, D.C. 20006

*Counsel for Amici Curiae*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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**Reno-Sparks Indian Colony, and**
**Sisseton-Wahpeton Tribe of South Dakota**

---

## STATEMENT OF INTEREST

The National Congress of American Indians, Inc. is a nonprofit association of 146 Indian tribes, including most of the major tribes in this country. It was incorporated in Oklahoma in 1954 to represent the interests of the Indian tribes of this country, and maintains its national headquarters at 1430 K Street, N.W., Washington, D.C. Its leadership is elected by its members. Its President is Veronica Murdock of the Colorado River Reservation,

Arizona; and its Vice President is Mel Tonasket of the Colville Reservation, Washington. NCAI's concern here arises from the fact that this case involves the extent to which Indian tribes may tax commerce between Indians and non-Indians on their reservations. This is to Indian tribes one of the most important issues before the courts today.

The other amici are the Seminole Tribe of Florida, the Reno-Sparks Colony of Nevada, the Las Vegas Colony of Nevada, and the Sisseton-Wahpeton Tribe of South Dakota, who are more fully described below. All are organized American Indian tribes recognized by the United States as being under federal supervision, and all derive tax revenues from retail cigarette sales on their reservations.

Your amici support the decision of the District Court.

## QUESTION PRESENTED

The issue here is one of fundamental importance to the future of Indian tribes: whether they have the power, should they choose to assert it, (1) to tax commercial transactions occurring on the reservations between Indians and non-Indians, and (2) by so doing to preempt state taxation of the same transaction, at least where the state taxes interfere with collection of the tribe's taxes. We believe that in light of Congressional and Executive policy and the precedents of this Court, the answer is yes.

We believe the legal issues are fully analyzed by the Appellee tribes in their elegant brief, and that we could not add usefully thereto. We believe that we can be of help to the Court by presenting some statistics on the national Indian situation today, and focusing especially on several particular tribes to whom taxing power is of immediate importance, so that the Court may better appreciate some of the ramifications of the issues at stake here.



## I. AN OVERVIEW OF UNITED STATES POLICY AND INDIAN SELF-GOVERNMENT TODAY

There are about 278 organized Indian tribes in the United States today,[1] and about 1,000,000 Indians.[2] The Indians originally, of course, owned all the land in the United States. Today they own some 51,533,000 acres under federal supervision,[3] or an area the size of New York, Connecticut, Massachusetts, New Hampshire and Vermont. This land is owned partly by Indian tribes and partly by their members. The large majority of this land is held in trust for the Indian owners by the United States; the balance is not technically held in trust, but is restricted and is under federal supervision the same as the trust land.

The Secretary of the Interior is the designated officer in charge of handling the federal supervision, 43 U.S.C. § 1457, and the Secretary's agency for performing this responsibility is the Bureau of Indian Affairs.[4]

The preeminent goal of Indian tribes today is to improve self-government of their reservations, and a corol-

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[1] 44 Fed. Reg. 7235 (1979), not counting Alaska native villages.

[2] The Official Indian Health Service Population Projections for Fiscal Year 1979 calculated the total United States Indian population to be 1,096,637, with 734,185 living on or near reservations.

[3] BIA, Office of Trust Responsibilities, Annual Report of Indian Lands (1977). In 1875, the total Indian reservation land base was about 166,000,000 acres. AIPRC Final Report, Vol. I, p. 308 (see note 6 below).

[4] The BIA Reorganization Task Force, established by the Secretary of the Interior, recently set forth the mission of the BIA, including "(2) To recognize and preserve the inherent rights of Indian tribal and Alaska Native self-government; to strengthen the capacities of these governments to govern . . . ." 43 Fed. Reg. 16284 (1978).

lary of this is to develop the economic resources of their reservations to provide the revenue on which meaningful self-government depends.

Some tribes own assets capable of development and of direct income to tribes through leases and sales. However, due to the national policy prior to 1934, which called for allotting tribal land to individaul Indians,[5] many tribes have been left with little land, and have no realistic prospect of raising revenue except through taxation of commerce on the reservation.

The modern statutes relevant to Indian self-government began with the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461*ff*. This Act repudiated the disastrous allotment policy, which was in fact a tribal termination policy, and set up the framework for tribes to organize and become self-governing communities recognized and supported by the United States. The preamble of the Act declares that Congress' purpose was—

> "To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes." 48 Stat. 984.

Many tribes organized under the Act, and elected tribal governments. Political and economic development, though encouraged by the Act, was slow. In the 1950's tribal progress under federal supervision was threatened by the termination policy that gained favor during the Eisenhower administration.[5a] Fortunately for tribal prog-

[5] This policy is embodied in the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331.

[5a] The policy was declared by Congress in H. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).



ress, the termination policy became a dead letter after 1962, though not before several tribes were terminated.[5b]

In 1970 President Nixon delivered an historic message to Congress, excerpts reprinted at App. 1a-12a. After repudiating the termination policy of the 1950's, and declaring that the federal trusteeship of Indians is not "an act of generosity" but is "the result of solemn obligations," and "continues to carry immense moral and legal force," the President concluded:

> "This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support. My specific recommendations to the Congress are designed to carry out this policy." App. 4a-5a.

One of President Nixon's recommendations became the Indian Financing Act of 1974, 25 U.S.C. §§ 1451*ff*, which authorized federal loans to Indian tribes. Section 2 declared the policy of Congress as follows:

> "It is hereby declared to be the policy of Congress to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own produc-

[5b] Six Indian groups were terminated in 1954 (e.g., Menominee, 25 U.S.C. § 891), two more in 1956, two more in 1958, and one in 1962. There have been no terminations since then, and in fact several have been restored to federal supervision, e.g. Menominee, 25 U.S.C. § 903.

tive efforts comparable to that enjoyed by non-Indians in neighboring communities."

The following year Congress enacted another of President Nixon's recommendations, the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. §§ 405*ff*. The essence of this Act was to allow tribes to contract with the BIA to perform some of the federal services to the tribes. Section 3(b) provided as follows:

> "The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services."

In 1976 President Ford reiterated his support of the foregoing policies, and declared his commitment to tribal "self-determination." App. 15a.

In 1978 President Carter declared that he considered it his duty to see that the U.S. fulfilled its responsibilities to Indians, "within the framework of self-determination for American Indians." App. 18a.

But improvement of tribal self-government, the avowed goal of Congress and the Executive Branch, has been severely impeded by the adverse socio-economic conditions on the reservations. Government studies have repeatedly demonstrated that American Indians continue to be the poorest, worst fed, least healthy group and to have the highest unemployment rate of any group in the United States population. This was documented most recently in 1977, when the American Indian Policy Review Commission issued a meticulous and scathing report.[6] It concluded that Indian reservation development was undermined by conditions on the reservation.[7]



If tribes are to realize the degree of self-government and self-support that the Legislative and Executive Branches intend, something must be done to improve the substandard conditions on the reservations. Federal grants and other assistance continue to be vital, but tribes will never be able to develop healthy economies until they develop their own sources of revenue.

## II. MEANINGFUL TRIBAL GOVERNMENT DEPENDS UPON ABILITY TO TAX

The American Indian Policy Review Commission Report, while documenting poor conditions on reservations, indicated the great potential of many Indian tribes

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[6] The American Indian Policy Review Commission (AIPRC) Final Report is a monumental review of Indian facts and policies. The Commission was created by Congress in 1975, P.L. 93-580, 88 Stat. 1910, and instructed to "conduct a comprehensive review of the historical and legal developments underlying the Indian's unique relationship with the Federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians." 25 U.S.C. 174 (1979 Supp. note). The membership of the Committee included Senators Metcalf, Abourezk and Hatfield; Congressmen Meeds, Yates and Steiger; and five representatives of the Indian community. These were sworn in by Mr. Justice White on May 2, 1975.

The Commission appointed 11 task forces to study and report on a wide range of subjects. The final report of the Commission was submitted on May 17, 1977, and consisted of 7400 pages, including two volumes of the final Committee report and 11 separate task force reports, AIPRC Report, 95th Cong., 1st Sess.

[7] Indian poverty statistics are summarized in the AIPRC Final Report, e.g., Vol. 1, pp. 91-94. The Commission noted the substandard "physical infrastructure" of Indian reservations, i.e. transport, power, water and communications systems. Lack of these systems discourages outside investments, yet tribes lack capital to improve their infrastructure systems. Final Report, Vol. 1, pp. 354-357 (1977).

to develop into independent economic units. Many Indian reservations contain large amounts of natural resources.[8] Taxation of these resources can provide substantial amounts of money for tribal governments.[9] Although the proceeds of sale of these resources (when owned by the tribes as opposed to their members) do presently provide vital income to the tribes, the amounts are often less than it would seem they should be. For example, in 1978, royalties actually received from Indian leases of coal averaged only 10%, less than one-half the 22% received from federal coal leases.[10] In fact, the 10% received by the Indians was even less than the statutory minimum of 12.5% required for federal minerals.[11]

For tribes that own no natural resources, taxation may represent the only revenue-raising method available. Congress has not yet seen fit to give tribes power to issue

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[8] "Deposits of oil and gas, coal, uranium and phosphate are found on some 40 reservations in 17 states. Production of coal on Indian lands in 1974 was 35.8 percent of the combined production on Federal and Indian lands (1.9 percent of the Nation's total); excluding offshore oil production, Indian lands produced 13.6 percent of the total production value of oil and gas on all Federal and Indian lands (4.4 percent of the Nation's total); phosphate production on Indian land was 35.4 percent of production on Federal and Indian land (4.9 percent of the Nation's total); and Indian lands produced fully 100 percent of the uranium value produced on all Federal and Indian lands." AIPRC Final Report, Vol. I, p. 7.

[9] See Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40 Law & Contemp. Probs. 166 (1976); Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Land*, 124 U.Pa. L. Rev. 491 (1975).

[10] U.S. Geological Survey, U.S. Department of Interior, *Federal and Indian Lands Coal, Phosphate, Potash, Sodium, and Other Mineral Production, Royalty Income, and Related Statistics* 39 (1979). *See generally* Federal Trade Commission, *Staff Report on Mineral Leasing on Indian Lands* (1975).

[11] 30 U.S.C. § 226.



tax-exempt bonds.[12] Such bonds often represent a major source of income for many state and local governments. As a consequence of the extreme poverty of the Indian people, income taxes upon tribal members are not a satisfactory answer. Tribal governments are also precluded from participating in many federal assistance programs which provide significant amounts of income to local units of government.[13] In addition, tribes have uniquely high costs[14] and do not receive most state services.[15] Such state services as their members do receive, such as welfare payments, are usually heavily underwritten by the federal government.

It is axiomatic that government, however localized, cannot operate without revenue. The traditional means of obtaining governmental revenue is through taxation[16]

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[12] See Miscellaneous Tax Bills: Hearings Before the Subcommittee on Miscellaneous Revenue Measures of the House Comm. on Ways and Means, 95th Cong., 1st Sess. 103 (1977) (Hearing on H.R. 4089 Tax Treatment of Indian Tribes and Alaskan Native Villages).

[13] American Indian Law Center, Study of Statutory Barriers to Tribal Participation in Federal Domestic Assistance Programs (1977). Of the 598 programs studied, Indian tribal governments were found to be ineligible for 140. For another 69, the statute requires state government involvement between the tribe and the federal agency, such as a signoff by the state governor on tribal programs. Actual participation by tribes in federal assistance programs is even lower. A 1974 National Council on Indian Opportunity *Study of Federal Indian Domestic Assistance Programs* found that of the 600 programs studied (not all the same as the later study), only 78 were serving at least one tribe, and only 39 were serving more than one tribe.

[14] Barsh, *The Omen: [Confederated] Tribes* v. *Moe and the Future of Tribal Self-Government*, 5 Amer. Ind. L. Rev. 1, 46 (1977).

[15] *Id.* at 51.

[16] "No power is more basic to the ultimate purpose and function of government than is the power to tax" *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960). *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 150 (1937).

and tribes, like all governments, must have this source of funding to exist.[17] The crucial relationship between Indian self-government and the ability of the tribe to obtain tax revenues was recently recognized by this Court in a case which upheld Indian immunity to state and local taxes:

> "The suggestion is that since tribal governments are disabled under many state laws from incorporating as local units of government, *Goldberg*, *supra*, at 581, general regulatory control might relegate tribal governments to a level below that of counties and municipalities, thus essentially destroying them, particularly *if they might raise revenue only after the tax base had been filtered through many governmental layers of taxation.*" [18]

Many tribes have turned to taxation in order to accomplish the greater self-government so long encouraged by Congress. In 1976 there were 55 tribes imposing various forms of taxes. In fiscal 1976, the last year for which the figures are available, these tribes collected more than $6,000,000 in taxes.[19] Almost one-half of this

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[17] The Court of Appeals in *Morris* v. *Hitchcock*, 21 App. D.C. 565, 593, *aff'd* 194 U.S. 384 (1904) stated in analyzing the powers of the Chickasaw Nation, "A government of the kind necessarily has the power to maintain its existence and effectiveness through the exercise of the usual power of taxation upon all property within its limits, save as may be restricted by its organic law," quoted at 55 I.D. 47-48 (1934).

[18] *Bryan* v. *Itasca County*, 426 U.S. 373, 388 note 14 (emphasis added). *See also, Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 664 (9th Cir. 1975), where the court stated: "Moreover, tribal use and development of tribal trust property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life. Extension of local jurisdiction to the reservation would burden that development by increasing its cost."

[19] Figures are from Department of the Treasury, Office of Revenue Sharing, "State and Local Data Elements, Entitlement Period 9".



amount was collected in mineral severance taxes.[20] In addition to the taxes actually collected by the tribes, the tax base is a component of the revenue sharing equation by which the tribes receive additional income from the federal government.[21]

This Court has recognized that actions having adverse economic impact on tribes may be inconsistent with the Congressional goal of fostering tribal government.

> "Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums, see pp. 9-10, *supra*, but it would also impose serious financial burdens on already 'financially disadvantaged' tribes." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 64-65 (1978).

The effect of the Washington state tax scheme on the tribes in this case would cause just such impermissible "serious financial burdens on already 'financially disadvantaged' tribes."

## III. THE SEMINOLE TRIBE OF FLORIDA

The Seminole Tribe of Florida consists of about 1400 members living in southern Florida. They live on three federal reservations, one of 480 acres in Hollywood; one

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[20] A number of Indian tribes are in the process of adopting or have recently adopted, severance tax codes. Some of them, e.g. Jicarilla Apache and Crow, are in litigation, see note 46 below, and see *Merrion* v. *Jicarilla Tribe*, unreported (D.N. Mex. 1977), argued before 10th Cir. May 17, 1979.

[21] While the entitlement of an Indian tribe to revenue-sharing funds is based upon population, taxes collected by the tribe are considered in determining the amount allocated to the state from which tribal shares are in turn reallotted. Act of October 20, 1972, 86 Stat. 919 as amended, 31 U.S.C. §§ 1227 (b)(4); 1228 (Supp. v 1975).

of 100,000 acres south of Lake Okeechobee (called the Big Cypress Reservation); and one of 38,000 acres north of the Lake (called the Brighton Reservation). The tribe has accepted the Indian Reorganization Act of 1934 and is organized thereunder. The current tribal chairman is James Billie. There are five Indian retail tobacco outlets on the Hollywood Reservation. Until the advent two years ago of an Indian retail tobacco outlet on the Hollywood Reservation, the Seminole Tribe had little to do with non-Indians outside of its relations with federal government officials. Its annual tribal council budget was about $440,000, mostly from rentals of tribal land. Most of this went to subsidize tribal programs and pay interest on loans.

The 1980 tribal council budget, just approved, is $1,620,000, and $1,000,000 of this will come from taxes and rents generated by retail cigarette sales on the Reservation. The new budget contains many new or increased items for community improvement, such as a law and order system (including five police officers); costs, subsidies and matching funds for many community programs such as Head Start, nutrition, handicapped, food stamp, senior citizens, refuse cleanup, fire protection, construction of clinic and recreational facilities, etc.

The first Seminole retail tobacco outlet was opened in 1977 on the Hollywood Reservation. It was owned by an individual tribal member, Marcellus Osceola, who leased the land from the Tribe and paid a 4% sales tax to the Tribe. The state tax authorities quickly became interested, and after consultation with Osceola and his attorneys, and Osceola's agreement that sales would be limited to three cartons per customer,[22] the state tax authorities

[22] Florida law permits a person to enter Florida with up to three cartons of cigarettes on which the Florida taxes have not been paid. F.S.A. 210.18(4)(b). Florida law also places the primary incidence of the tax on the seller, not the buyer, although the buyer owes the tax if the seller fails to pay it. F.S.A. 210.18(4)(a).



concluded that it would not seek to collect state taxes from Osceola's cigarette sales to non-Indians.

A cigarette vending machine company then sued the state to require the tax authorities to collect state taxes on Osceola's sales to non-Indians. The state trial court ruled that the taxes were not applicable, on the ground that the incidence of the tax was on the seller (an Indian), not the buyer (in most cases a non-Indian),[23] and that the state tax could not be collected against an Indian.[24]

The vending group appealed, and the Florida intermediate appellate court affirmed in a brief opinion. After distinguishing *Moe*, the court added:

> "More on point is Confederated Tribes of Colville v. State of Washington, 446 F. Supp. 1339 (1978) [the case on review here], which, though not controlling, is persuasive authority." [25]

Since that time, four more retail outlets have been opened on the Hollywood Reservation. As mentioned above, the Seminole Tribe expects to realize over $1,000,000 in cigarette tax and rental revenues in fiscal 1980. The loss of this income would be a severe blow indeed to the ability of the Tribe to provide municipal services to the Reservation.

## IV. THE COEUR D'ALENE TRIBE

The Coeur d'Alene Tribe is a federally recognized tribe consisting of about 1,000 members. The tribe and its members own some 70,000 acres of trust land on the

[23] *Vending Unlimited, Inc.* v. *State of Florida*, Second Jud. Cir. Ct. for Leon County, March 3, 1978, reprinted below, App. 21a-28a.

[24] Citing *Bryan* v. *Itasca County*, 426 U.S. 373 (1976); *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164 (1973); *Moe* v. *Confederated Tribes*, 425 U.S. 463 (1976).

[25] *Vending Unlimited* v. *State of Florida*, 364 So.2d 548 (Dist. Ct. App. Fla. 1978), reprinted below, App. 19a-20a.

Coeur d'Alene Reservation in northern Idaho. The tribe is organized under the Indian Reorganization Act of 1934. Its annual tribal council budget is about $350,000, of which about $60,000 comes from taxes on cigarette sales.

In 1973 the Idaho Supreme Court in the *Mahoney* case upheld the legality of cigarette sales to non-Indians free of state taxes, on the ground that for the state to collect these taxes would be an impermissible taxation of Indian commerce.[26] The court cited with approval a 1940 ruling of the Solicitor of the Interior Department to the same effect.[27]

The Idaho Supreme Court adhered to its decision even after the *Moe* decision went the other way.[28]

Obviously the loss of cigarette revenues would materially reduce the ability of this tribe to provide municipal services to the reservation.

## V. THE NEVADA TRIBES

The Las Vegas Indian Colony is a group of 135 Paiute Indians located on a federal reservation of 12.5 acres within the city limits of Las Vegas, Nevada. It is recognized by the Secretary of the Interior as an Indian tribe

[26] *Mahoney* v. *State Tax Comm'n*, 96 Ida. 59, 524 P.2d 187 (1973). "Indian commerce" refers to the clause in the U.S. Constitution conferring upon Congress the power "to regulate commerce . . . with the Indian Tribes." Art. I, Sec. 8, cl. 3.

[27] 57 I.D. 129, 140-141 (1940).

[28] The initial *Mahoney* decision came down on September 5, 1973. Eight months later the District Court decision in *Moe* came down, 392 F. Supp. 1297 (D. Mont. 1974). At the request of the state of Idaho the *Mahoney* court granted rehearing, and after full briefing reaffirmed its earlier decision, 524 P.2d at 197 (1974). Later, of course, this Court affirmed the *Moe* District Court decision, 425 U.S. 463 (1976), but the state has apparently acquiesced in the *Mahoney* decision.



under federal supervision. It has accepted the Indian Reorganization Act of 1934, and is organized thereunder with a tribal council composed of seven members. The tribal chairman is Gloria Yazzie.

The Reno-Sparks Indian Colony is a group of 557 Paiute, Washoe and Shoshone Indians located on a federal reservation of 28 acres adjacent to the city of Reno, Nevada. It has accepted the Indian Reorganization Act of 1934 and is organized thereunder with a tribal council composed of seven members. Its tribal chairman is Lawrence Astor.

The Las Vegas and Reno Tribes share a common heritage of poverty, poor education and erosion of tribal culture during years of existence on tiny urban reservations. A recent BIA study,[29] for example, found that over 90% of existing housing units in the Las Vegas Colony were substandard, and conditions were so overcrowded that the existing number of units would have to be more than doubled to meet the need.[30] Yet available land is already fully covered with houses; there is no room to build more. Another 1978 BIA survey found that half of the employed members of the Reno-Sparks Colony earned under $5,000 a year.[31]

Las Vegas, Reno-Sparks, and several other Nevada tribes have enacted taxation ordinances and opened re-

[29] Bureau of Indian Affairs Annual Housing Inventory Fiscal Year, 1978.

[30] *Id.* Of 22 existing units, 21 were determined to be substandard and needing replacement. In addition, 25 new units were needed to alleviate overcrowding.

[31] Bureau of Indian Affairs Agency estimates, April 1977. Of 161 employed member of the Colony, only 81 earned over $5,000 a year.

tail tobacco outlets.[32] In such cases cigarette tax revenues typically provide virtually the only source of revenues for these tribal governments, aside from federal grants. As the state of Washington has admitted in this case,[33] double taxation of cigarette sales would eliminate these revenues.[34] The state of Nevada provides no services to the Tribe, and has no equitable claim to any revenues raised on the reservation.[35]

The Las Vegas Indian Colony expenses for the fiscal year ended June 30, 1979, were $284,450, of which $257,880 was derived from cigarette tax revenue, and $26,570 was derived from two federal government grants.[36] Thus, over 90% of all funds expended in fiscal 1979 by the Las Vegas Tribe was derived from tribal tobacco revenues. These funds were expended for basic governmental services, including tribal police, tribal patrol car and police equipment, tribal vehicles, a tractor for

[32] Other Indian reservations in Nevada where tobacco outlets have been opened are: Elko; Fallon Paiute Shoshone; Moapa; Duck Valley; Pyramid Lake Paiute; Walker River Paiute; Yerington Paiute; Battle Mountain; and Washoe.

[33] Appellants' brief at 19, 21, 29, 56.

[34] Nevada has adopted a different approach than Washington. It has enacted a statute providing that unless an Indian government imposes excise taxes on cigarette sales which are equal to or greater than the state tax, the tribe must collect the state tax in addition to the tribal tax. Nev. Rev. Stat. Ch. 370. This approach destroys the tribes' ability to set their tax at a lower level than the state's. Without this advantage, few buyers would be attracted to the tribal stores. There is nothing unique about citizens of one jurisdiction flocking to another to buy goods made cheaper by smaller taxes. See Barsh, *supra*, note 14, at 52: "Washington State's cigarette tax stamp costs 16 cents. Oregon's rate has always been lower; it is currently 9 cents. As a result, purchase of cigarettes by Washingtonians in Oregon boom[s] in border counties."

[35] For example, the State refuses to place Indians in need of mental health treatment, despite tribal court commitment orders.

[36] Pursuant to P.L. 93-638, 25 U.S.C. § 450, contract numbers H50C14201261 and H50G14208059.



demolition, land fill and improvements, land acquisition to maintain buildings and water main, to build a basketball court, make capital improvements, and to fund youth programs.

The Reno-Sparks Colony estimated revenues for calendar year 1979 are $636,000, of which $360,000, or 57%, will be derived from cigarette tax revenues.[37] The cigarette tax revenues support a tribal police program, a land purchase program, and the tribal council administration budget.

The urgent need for independent tribal revenue is shown by the following example. At Reno-Sparks, individual tribal members fell badly in arrears on their municipal sewer bills. The city notified the tribe that "unless some arrangements are made with the City to pay the delinquent fees within thirty (30) days from receipt of this letter, sewer services will be cut off to the Colony."[38] The relevant United States agencies claimed inability to help, and the Tribe and its members lacked any other sources of funds to pay the $10,686.72 due. Thanks to the new cigarette tax revenues, the Tribe assumed its members' delinquent bills and thus prevented the cutoff of sewer service to the whole Tribe.

In addition to providing emergency funds to meet basic human needs, cigarette tax revenues offer these land-short tribes their only source of funds with which to alleviate the severe pressure on the crowded reservations through purchase of adjacent land. The Las Vegas Colony has already bought 2.5 acres with funds from cigarette tax revenue and plans to make further purchases with these revenues. The Reno-Sparks Tribe also plans to make land purchases.

[37] The large bulk of the non-cigarette revenues are federal grants.

[38] Letter from Reno City Attorney to Chairman, Reno-Sparks Indian Colony, October 11, 1977.

Obviously, loss of cigarette revenues to these tribes would severely reduce their ability to provide municipal services to their reservations.

## VI. THE SISSETON-WAHPETON SIOUX TRIBE

The Sisseton-Wahpeton Sioux Tribe, which has about 3,600 members, is located on the Lake Traverse Reservation in North and South Dakota.[39] The current tribal chairman is Jerry Flute.

The Sisseton-Wahpeton Tribe recently enacted a sales tax on tangible personal property sales and an excise tax on sales of tobacco products.[40] Both apply only to its political subdivisions. The taxing statutes spell out the governmental services to which the revenue may be devoted, including police and fire protection; road construction, repair and maintenance; operation of tribal court; water, sewage, and garbage disposal; education; public health; development of tribal or district enterprises; and recreation.

The Tribe already provides almost all of the services generally furnished by municipal governments, and plans to use revenue from tobacco and other sales to further expand the type and amount of services offered to its members.

The Tribe expects tax revenues to contribute a major part of the Tribe's total budget once an interstate highway now under construction opens. There will be a

[39] The Sisseton-Wahpeton Reservation was the subject of this Court's decision in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975). The Lake Traverse Reservation was held by this Court to be terminated. Within the boundaries of the former reservation the Tribe owns 11,000 acres of trust land and its members own 94,000 acres of trust land.

[40] Sisseton-Wahpeton Sioux Tribal Code; Tribal Business Tangible Personal Property Sales Tax Act and Tobacco Outlets and Excise Tax Act.



cloverleaf on the reservation, and the Tribe owns land adjacent thereto. The Tribe plans a store there, which will sell cigarettes, among other things.

## VII. THE CROW TRIBE

The Crow Tribe has about 4,500 members, located on a reservation in Montana of approximately 1.6 million acres. The Crow Tribe's main commercial resource is coal, which is abundant in the area. The Tribe owns large deposits underlying tribal trust land within the reservation, and also large deposits outside the reservation, reserved in federal trust when the tribe ceded surface rights to adjacent land.

The Crow unemployment rate has recently been estimated to be 48%.[41] Crow health, income, educational level and housing all fall far below the corresponding state and national averages.[42] Tribal revenues are derived from two major sources, the federal government and royalty payments for coal. Derivation of additional revenue from existing and proposed coal leases represents the Tribe's only prospect of achieving governmental and economic self-sufficiency and escaping from a history of dependence upon the federal government.

In 1975 the state of Montana enacted a severance tax on coal mined on the Reservation, in the amount of 30 percent of its value.[43] This extremely high tax has severely

[41] Bureau of Indian Affairs, U.S. Department of Interior, Estimates of Indian Population On and Adjacent to Reservations and Labor Force Status By State: April 1977, p. 8.

[42] Bureau of the Census, U.S. Dept. of Commerce, *1970 Census of Population, Detailed Characteristics, United States Summary* (1-679); *Characteristics of the Population: Montana*, pt. 28 at 28-135; *Subject Reports, American Indians* 161, 171 (1973).

[43] Mont. Rev. Codes Ann. §§ 84-1312 to -1325 (Cum. Supp. 1977) (now codified at M.C.A. §§ 15-35-101 to -110, 15-25-701 to -704).

undermined if not destroyed the Tribe's own ability to derive tax revenues from the exploitation of its coal, because in all negotiations with potential developers, the amount of royalties to be paid to the Tribe is reduced by an amount approximately equal to the amount that must be paid to the state of Montana. Furthermore, since 1975 the state has collected through taxes over three times as much money from the Tribe's coal as has the Tribe through its royalties. While Montana distributes severance tax collections to units of local government, the Crow tribal government has received none.[44]

In 1976 the Tribe enacted its own severance tax.[45] However, this tax will price Crow coal out of the marketplace unless the tribal tax preempts the state taxes.[46] Companies with whom the Tribe has been negotiating have clearly indicated that they will be economically prohibited from developing Crow coal if forced to pay both state and tribal taxes.

If this Court holds that state taxes are not preempted even when they interfere with or prevent tribal taxes, the Crow Tribe's ability to increase its tribal revenues for municipal services to its members will be severely reduced.

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[44] See Mont. Rev. Codes Ann. §§ 84-1319 (now codified at M.C.A. § 15-35-108). This section provides how money derived from the severance tax is to be appropriated. Indian tribes are not included in the appropriations.

[45] The tax enacted dealt with taxation of coal production on the reservation proper. This tax was approved by the Secretary of the Interior on January 17, 1977. The Tribe has recently extended the tribal severance tax to embrace the Tribe's coal underlying the ceded area.

[46] The Crow Tribe brought suit to have the state tax declared preempted by the tribal tax. The District Court of Montana rejected the preemption argument and upheld the state tax. *Crow Tribe* v. *State of Montana*, —— F. Supp. —— (D. Mont. April 3, 1979).



## CONCLUSION

We have reviewed federal Indian policy, and shown how important it is that tribes be able to tax commerce on their reservations. We have shown how several particular tribes would be affected if states are allowed to tax reservation commerce despite the detrimental effect on the tribes' own taxing programs. We urge the Court to affirm the District Court.

Respectfully submitted,

CHARLES A. HOBBS
1735 New York Avenue, N.W.
Washington, D.C. 20006

*Counsel for Amici Curiae*

*Of Counsel*:

STEPHEN H. WHILDEN
Hollywood, Florida

PETER J. SFERRAZZA
Reno, Nevada

BERTRAM E. HIRSCH
Belle Rose, New York

WILKINSON, CRAGUN & BARKER
GLENN P. SUGAMELI
Washington, D.C.

July 6, 1979

# Appendices

## APPENDIX A

## THE PRESIDENT'S MESSAGE TO CONGRESS, JULY 8, 1970

116 Cong. Rec. 23258

6 Pres. Doc. 894 (1970)

*To the Congress of the United States*:

The first Americans—the Indians—are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom.

This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been opposed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny. Even the Federal programs which are intended to meet their needs have frequently proven to be ineffective and demeaning.

But the story of the Indian in America is something more than the record of the white man's frequent aggression, broken agreements, intermittent remorse and prolonged failure. It is a record also of endurance, of survival, of adaptation and creativity in the face of overwhelming obstacles. It is a record of enormous contributions to this country—to its art and culture, to its strength and spirit, to its sense of history and its sense of purpose.

It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what

the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.

*Self-Determination Without Termination*

The first and most basic question that must be answered with respect to Indian policy concerns the historic and legal relationship between the Federal government and Indian communities. In the past, this relationship has oscillated between two equally harsh and unacceptable extremes.

On the one hand, it has—at various times during previous Administrations—been the stated policy objective of both the Executive and Legislative branches of the Federal government eventually to terminate the trusteeship relationship between the Federal government and the Indian people. As recently as August of 1953, in House Concurrent Resolution 108, the Congress declared that termination was the long-range goal of its Indian policies. This would mean that Indian tribes would eventually lose any special standing they had under Federal law: the tax exempt status of their lands would be discontinued; Federal responsibility for their economic and s cial well-being would be repudiated; and the tribes themselves would be effectively dismantled. Tribal property would be divided among individual members who would then be assimilated into the society at large.

This policy of forced termination is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The



special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.

This goal, of course, has never been achieved. But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American.

The second reason for rejecting forced termination is that the practical results have been clearly harmful in the few instances in which termination actually has been tried. The removal of Federal trusteeship responsibility has produced considerable disorientation among the affected Indians and has left them unable to relate to a myriad of Federal, State and local assistance efforts. Their economic and social condition has often been worse after termination than it was before.

The third argument I would make against forced termination concerns the effect it has had upon the overwhelming majority of tribes which still enjoy a special relationship with the Federal government. The very threat that this relationship may someday be ended has created a great deal of apprehension among Indian

groups and this apprehension, in turn, has had a blighting effect on tribal progress. Any step that might result in greater social, economic or political autonomy is regarded with suspicion by many Indians who fear that it will only bring them closer to the day when the Federal government will disavow its responsibility and cut them adrift.

In short, the fear of one extreme policy, forced termination, has often worked to produce the opposite extreme: excessive dependence on the Federal government. In many cases this dependence is so great that the Indian community is almost entirely run by outsiders who are responsible and resposive to Federal officials in Washington, D.C., rather than to the communities they are supposed to be serving. This is the second of the two harsh approaches which have long plagued our Indian policies. Of the Department of the Interior's programs directly serving Indians, for example, only 1.5 percent are presently under Indian control. Only 2.4 percent of HEW's Indian health programs are run by Indians. The result is a burgeoning Federal bureaucracy, programs which are far less effective than they ought to be, and an erosion of Indian initiative and morale.

I believe that both of these policy extremes are wrong. Federal termination errs in one direction, Federal paternalism errs in the other. Only by clearly rejecting both of these extremes can we achieve a policy which truly serves the best interests of the Indian people. Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered.

This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume



control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support. My specific recommendations to the Congress are designed to carry out this policy.

1. *Rejecting Termination*

Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to pass a new Concurrent Resolution which would expressly renounce, repudiate and repeal the termination policy as expressed in House Concurrent Resolution 108 of the 83rd Congress. This resolution would explicitly affirm the integrity and right to continued existence of all Indian tribes and Alaska native governments, recognizing that cultural pluralism is a source of national strength. It would assure these groups that the United States Government would continue to carry out its treaty and trusteeship obligations to them as long as the groups themselves believed that such a policy was necessary or desirable. It would guarantee that whenever Indian groups decided to assume control or responsibility for government service programs, they could do so and still receive adequate Federal financial support. In short, such a resolution would reaffirm for the Legislative branch—as I hereby affirm for the Executive branch—that the historic relationship between the Federal government and the Indian communities cannot be abridged without the consent of the Indians.

2. *The Right to Control and Operate Federal Programs*

Even as we reject the goal of forced termination, so must we reject the suffocating pattern of paternalism.

But how can we best do this? In the past, we have often assumed that because the government is obliged to provide certain services for Indians, it therefore must administer those same services. And to get rid of Federal administration, by the same token, often meant getting rid of the whole Federal program. But there is no necessary reason for this assumption. Federal support programs for non-Indian communities—hospitals and schools are two ready examples—are ordinarily administered by local authorities. There is no reason why Indian communities should be deprived of the privilege of self-determination merely because they receive monetary support from the Federal government. Nor should they lose Federal money because they reject Federal control.

For years we have talked about encouraging Indians to exercise greater self-determination, but our progress has never been commensurate with our promises. Part of the reason for this situation has been the threat of termination. But another reason is the fact that when a decision is made as to whether a Federal program will be turned over to Indian administration, it is the Federal authorities and not the Indian people who finally make that decision.

This situation should be reversed. In my judgment, it should be up to the Indian tribe to determine whether it is willing and able to assume administrative responsibility for a service program which is presently administered by a Federal agency. To this end, I am proposing legislation which would empower a tribe or a group of tribes or any other Indian community to take over the control or operation of Federally-funded and administered programs in the Department of the Interior and the Department of Health, Education and Welfare whenever the tribal council or comparable community governing group voted to do so.



Under this legislation, it would not be necessary for the Federal agency administering the program to approve the transfer of responsibility. It is my hope and expectation that most such transfers of power would still take place consensually as a result of negotiations between the local community and the Federal government. But in those cases in which an impasse arises between the two parties, the final determination should rest with the Indian community.

Under the proposed legislation, Indian control of Indian programs would always be a wholly voluntary matter. It would be possible for an Indian group to select that program or that specified portion of a program that it wants to run without assuming responsibility for other components. The "right of retrocession" would also be guaranteed; this means that if the local community elected to administer a program and then later decided to give it back to the Federal government, it would always be able to do so.

Appropriate technical assistance to help local organizations successfully operate these programs would be provided by the Federal government. No tribe would risk economic disadvantage from managing its own programs; under the proposed legislation, locally-administered programs would be funded on equal terms with similar services still administered by Federal authorities. The legislation I propose would include appropriate protections against any action which endangered the rights, the health, the safety or the welfare of individuals. It would also contain accountability procedures to guard against gross negligence or mismanagement of Federal funds.

This legislation would apply only to services which go directly from the Federal government to the Indian community; those services which are channeled through State or local governments could still be turned over to Indian control by mutual consent. To run the activities for

which they have assumed control, the Indian groups could employ local people or outside experts. If they chose to hire Federal employees who had formerly administered these projects, those employees would still enjoy the privileges of Federal employee benefit programs—under special legislation which will also be submitted to the Congress.

Legislation which guarantees the right of Indians to contract for the control or operation of Federal programs would directly channel more money into Indian communities, since Indians themselves would be administering programs and drawing salaries which now often go to non-Indian administrators. The potential for Indian control is significant, for we are talking about programs which annually spend over $400 million in Federal funds. A policy which encourages Indian administration of these programs will help build greater pride and resourcefulness within the Indian community. At the same time, programs which are managed and operated by Indians are likely to be more effective in meeting Indian needs.

I speak with added confidence about these anticipated results because of the favorable experience of programs which have already been turned over to Indian control. Under the auspices of the Office of Economic Opportunity, Indian communities now run more than 60 community action agencies which are located on Federal reservations. OEO is planning to spend some $57 million in Fiscal Year 1971 through Indian-controlled grantees. For over four years, many OEO-funded programs have operated under the control of local Indian organizations and the results have been most heartening.

Two Indian tribes—the Salt River Tribe and the Zuni Tribe—have recently extended this principle of local control to virtually all of the programs which the Bureau of Indian Affairs has traditionally administered for



them. Many Federal officials, including the Agency Superintendent, have been replaced by elected tribal officers or tribal employees. The times has now come to build on these experiences and to extend local Indian control—at a rate and to the degree that the Indians themselves establish.

3. *Restoring the Sacred Lands Near Blue Lake*

* * * *

4. *Indian Education*

* * * *

5. *Economic Development Legislation*

Economic deprivation is among the most serious of Indian problems. Unemployment among Indians is ten times the national average; the unemployment rate runs as high as 80 percent on some of the poorest reservations. Eighty percent of reservation Indians have an income which falls below the poverty line; the average annual income for such families is only $1,500. As I said in September of 1968, it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructnure. To that end, I am proposing the "Indian Financing Act of 1970."

This act would do two things:

1. It would broaden the existing Revolving Loan Fund, which loans money for Indian economic development projects. I am asking that the authorization for this fund be increased from approximately $25 million to $75 million.

2. It would provide additional incentives in the form of loan guarantees, loan insurance and interest subsidies to encourage *prviate* lenders to loan more money

for Indian economic projects. An aggregate amount of $200 million would be authorized for loan guarantee and loan insurance purposes.

I also urge that legislation be enacted which would permit any tribe which chooses to do so to enter into leases of its land for up to 99 years. Indian people now own over 50 million acres of land that are held in trust by the Federal government. In order to compete in attracting investment capital for commercial, industrial and recreational development of these lands, it is essential that the tribes be able to offer long-term leases. Long-term leasing is preferable to selling such property since it enables tribes to preserve the trust ownership of their reservation homelands. But existing law limits the length of time for which many tribes can enter into such leases. Moreover, when long-term leasing is allowed, it has been granted by Congress on a case-by-case basis, a policy which again reflects a deep-rooted pattern of paternalism. The twenty reservations which have already been given authority for long-term leasing have realized important benefits from that privilege and this opportunity should now be extended to all Indian tribes.

Economic planning is another era where our efforts can be significantly improved. The comprehensive economic development plans that have been created by both the Pima-Maricopa and the Zuni Tribes provide outstanding examples of interagency cooperation in fostering Indian economic growth. The Zuni Plan, for example, extends for at least five years and involves a total of $55 million from the Departments of Interior, Housing and Urban Development, and Health, Education and Welfare and from the Office of Economic Opportunity and the Economic Development Administration. I am directing the Secretary of the Interior to play an active role in coordinating additional projects of this kind.



6. *More Money for Indian Health*

* * * *

7. *Helping Urban Indians*

* * * *

8. *Indian Trust Counsel Authority*

* * * *

9. *Assistant Secretary for Indian and Territorial Affairs*

* * * *

*Continuing Programs*

* * * *

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The recommendations of this Administration represent an historic step forward in Indian policy. We are proposing to break sharply with past approaches to Indian problems. In place of a long series of piecemeal reforms, we suggest a new and coherent strategy. In place of policies which simply call for more spending, we suggest policies which call for wiser spending. In place of policies which oscillate between the deadly extremes of forced termination and constant paternalism, we suggest a policy in which the Federal government and the Indian community play complementary roles.

But most importantly, we have turned from the question of *whether* the Federal government has a responsibility to Indians to the question of *how* that responsibility can best be fulfilled. We have concluded that the Indians will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them.

The Indians of America need Federal assistance—this much has long been clear. What has not always been

clear, however, is that the Federal government needs Indian energies and Indian leadership if its assistance is to be effective in improving the conditions of Indian life. It is a new and balanced relationship between the United States government and the first Americans that is at the heart of our approach to Indian problems. And that is why we now approach these problems with new confidence that they will successfully be overcome.

RICHARD NIXON

The White House
July 8, 1970



**APPENDIX B**

FOR IMMEDIATE RELEASE JULY 16, 1976

OFFICE OF THE WHITE HOUSE PRESS SECRETARY

THE WHITE HOUSE

REMARKS OF THE PRESIDENT
[Gerald Ford]

TO THE
AMERICAN INDIAN LEADERS

THE EAST ROOM

3:15 P.M. EDT

Let me welcome each and every one of you to the White House this afternoon. I am extremely happy to have the opportunity to meet with you individually as well as collectively and I am very proud to have the distinguished leaders and the elected representatives of America's Indian tribes here in the East Room of the White House.

I looked over your schedule and I hope from the distinguished speakers that spoke with you that you have had an informative briefing session, not only with Secretary Kleppe, but the others—those who were responsible for some of the Government Indian programs. I think it is vitally important that you tell us what your problems are, what your needs are and then we can be fully informed as to the right policies and the right programs.

Let me take just a few minutes to talk with you on a personal basis, to let you know of my personal concern and for the needs of Indians and native Americans. The Federal Government has a very unique relationship with you and your people. It is a relationship of a legal

trust and a high moral responsibility. That relationship is rooted deep in history, but it is fed today by our concern that the Indian people should enjoy the same opportunities as other Americans, while maintaining the culture and the traditions that you rightly prize as your heritage.

That heritage is an important part of the American culture that we are celebrating in this great country in our Bicentennial year. Your contribution has been both material and spiritual. Your ancestors introduced settlers not only to new foods and new plants, but to Indian ways of life and Indian values which they absorbed.

This is a year for all of us to realize what a great debt we individually and collectively owe to the American Indians. Today, you are concerned about such serious problems as poverty, unemployment, crime, poor health and unsuitable housing on Indian reservations. I share your concern. I am hopeful about the future and about what we can achieve by continuing to work together.

The 1970s have brought a new era in Indian affairs. In the last century, Federal policy has vacillated between paternalism and the threat of terminating Federal responsibility. I am opposed to both extremes. I believe in maintaining a stable policy so that Indians and Indian leaders can plan and work confidently for the future.

We can build on that foundation to improve the opportunities available to American Indians, and at the same time, make it possible for you to live as you choose within your tribal structure and in brotherhood with your fellow citizens.

We have already begun to build. My Administration is supporting the concept of allowing Indian tribes to determine whether they and their members, in addition to



being under tribal jurisdiction, should be under State or Federal civil and criminal jurisdiction.

I have directed the Departments of Justice and Interior to draft legislation which would accomplish this goal efficiently, effectively and within adequate guidelines. They have solicited the views of the Indian community in preparing their recommendations which I will soon send to the Congress.

I am committed to furthering the self-determination of Indian communities but without terminating the special relationship between the Federal Government and the Indian people. I am strongly opposed to termination. Self-determination means that you can decide the nature of your tribe's relationship with the Federal Government within the framework of the Self-Determination Act, which I signed in January of 1975.

Indian tribes, if they desire, now have the opportunity to administer Federal programs for themselves. We can then work together as partners.

On your part, this requires initiative and responsibility as you define your tribal goals and determine how you want to use the Federal resources. On the Federal Government's part, self-determination for Indian tribes requires that Federal programs must be flexible enough to deal with the different needs and desires of individual tribes.

In the past, our flexibility has been limited by the lack of effective coordination among departments and agencies offering a wide variety of programs and services to the Indian people. Programs serving both reservation and non-reservation Indians are spread across half a dozen different Cabinet Departments involving agencies ranging from the Economic Development Administration to the Federal Aviation Administration.

As many of you know, this is Ted Marrs' last day on the White House staff. Ted's service as White House Liaison for Indian Affairs has been invaluable to me as President and to the Cabinet officers and, I am confident, to the Indian community.

With his departure, I will announce shortly the name of a person who will assume Ted Marrs' duties in the Office of Public Liaison in the area of Indian Affairs. This appointee will be an individual with responsibility to work with the Cabinet officers, with the Office of Management and Budget, with the Domestic Council and with my Legal Office to encourage the improved coordination of the various Federal agencies and programs that currently serve the Indian population.

As an additional step in this direction, I am also sending a memorandum to the heads of all Cabinet departments with Indian responsibilities, directing them to give priority attention to the coordination of Indian programs. These two actions will help to insure that one and one half billion dollars spent annually on Indian programs and services will be spent efficiently, with cooperation and without duplication.

An important task we can help you with is the challenge of economic development of your lands. I congratulate you on the initiative that you have shown. I pledge encouragement. I pledge help in your efforts to create long-term economic development.

Many Indian reservations contain valuable natural resources. There must be the proper treatment of these resources with respect for nature, which is a traditional Indian value. My Attorney General has established an Indian resources section whose sole responsibility is litigation on behalf of Indian tribes to protect your natural resources and your jurisdictional rights.



Indian leaders and the Indian people have gained an increasing skill in managing these resources so they benefit your tribes and our nation as a whole. I wholeheartedly and uuequivocally pledge our cooperation in working with you to improve the quality of Indian life by providing soundly managed programs and a stable policy.

We can make the rest of the 1970s decisive years in the lives of the Indian people. Together we can write a new chapter in the history of this land that we all serve and this land that we all share.

I thank you very much.

## APPENDIX C

THE WHITE HOUSE

WASHINGTON

August 30, 1978

I extend best wishes to the delegates at the Thirty-Fifth Congressional Session of the National Congress of American Indians, and I hope your conference will be a productive and rewarding one.

I realize this is an unusual and perplexing time for Indian leaders. At both the state and Federal levels there is a deep concern about events that might change the status of American Indians. There is also concern about the environmental and energy shifts that have changed the lives of all our citizens.

I consider it my solemn duty and obligation as President to see that we fulfill our trusteeship responsibilities within the framework of self-determination for American Indians. In particular, I would like to reaffirm my resolve to honor this country's legal and moral responsibilities to American Indians in protecting their land, water and natural resources. And I am fully committed to the task of protecting the human and civil rights of all native Americans.

On behalf of my Administration, I congratulate the officers and delegates at this Congress for their hard work and sustained accomplishment. The Federal Government has a special relationship with Indian tribes, and I look forward to our close cooperaation in the coming years.

/s/ Jimmy Carter



## APPENDIX D

VENDING UNLIMITED CASE—APPELLATE OPINION, 364 So.2d 548

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JULY TERM, A.D., 1978

Case No. JJ-406

VENDING UNLIMITED, INC., d/b/a/ ACE SAXON, a Florida corporation, and EDWARD J. STACK,
*Appellants,*

v.

STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, and CHARLES A. NUZUM, Director,
*Appellees.*

Opinion filed November 22, 1978.

An appeal from the Circuit Court for Leon County. Charles E. Miner, Jr., Judge.

David T. Price of Price & Byrne for appellant.

Dennis E. LaRosa; Jack M. Skelding, Jr. of Madigan, Parker, Gatlin, Swedmark & Skelding; Sherryll Martens Dunaj; A. J. Ryan; Lawrence A. Aschenbrenner for appellee.

PER CURIAM.

This case involves Indians, Indian reservations and taxes. Appellant Stack, though a public official, sought in

his individual capacity as a citizen and taxpayer to require imposition of taxes on certain transactions involving the sale of cigarettes to and by Osceola, whose place of business is located on an Indian reservation within the boundaries of the State of Florida. Appellees took the unusual position, though with admirable candor, that the sales were not taxable by the taxing authorities of the State of Florida. Appellant, having been unsuccessful in his endeavor to require imposition of the tax, sought review here, relying primarily on Moe v. The Confederated Salish and Kootenai Tribes, 96 S.Ct. 148 (1976). We find that case to be distinguishable for the reason that, inter alia, the statute there involved is materially different from the relevant Florida statutes as written and construed. More on point is Confederated Tribes of Colville v. State of Washington, 446 F.Supp. 1339 (1978), which, though not controlling, is persuasive authority.

AFFIRMED.

BOYER, Acting Chief Judge, MILLS and BOOTH, JJ., Concur.



## APPENDIX E

## VENDING UNLIMITED CASE—TRIAL COURT OPINION

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

ORDER

Case No. 77-1933

VENDING UNLIMITED, INC., d/b/a/ ACE SAXON, a Florida corporation, and EDWARD J. STACK,
*Plaintiffs/Petitioners,*

vs.

STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, and CHARLES A. NUZUM, Director,
*Defendants/Respondents.*

This action is an original proceeding in mandamus brought by two Florida taxpayers seeking an order directing the State of Florida, Department of Business Regulation, Division of Alcoholic Beverages and Tobacco (State), to collect cigarette taxes from a Seminole Indian-owned Smoke Shop located in Broward County, Florida.

The Court finds that it has jurisdiction over the subject matter, and parties pursuant to Article V, Section 5, *Florida Constitution.* The executive branch of government is not immune from the coercive powers of the Circuit Courts which may direct the exercise of a non-discretionary function. The Petitioners (Vending Unlimited), submit that the collection of the cigarette tax imposed under Chapter 210, Florida Statutes, and to be

collected by the State is a mandatory function which is devoid of discretionary character.

It is appropriate, therefore, to explore that function and determine whether Chapter 210, Florida Statutes mandates the collection of the cigarette tax from the Smoke Shop under the facts of this case. The Smoke Shop has intervened in these proceedings and defends the State's petition.

## FINDINGS OF FACT

The following is a recitation of the relevant facts stipulated to and submitted by the parties.

Intervenor, Marcellus Osceola, d/b/a/ Osceola's Trading Post (Smoke Shop), is an enrolled member of the Seminole Indian Tribe, and owner of a cigarette business located on the Hollywood Seminole Indian Reservation in Broward County. The principal item for sale is cigarettes shipped directly from Alabama to the Smoke Shop via common carrier. The cigarettes are currently being sold to the general public and no cigarette tax is collected by the Smoke Shop nor remitted to the State.

The Smoke Shop is located on U. S. Highway 441 (State Road 7), several blocks south of Sterling Road. Motorists obtain access to the shop by turning off of Highway 441 and proceeding to two drive-in windows located on two sides of a mobile home type building. Sales at the Smoke Shop are estimated at 115,000 cartons per month and when translated into tax dollars at a rate of $2.10 per carton, the total exceeds $2.8 million per year. Since August 15, 1977 the Smoke Shop's laid-in cost of cigarettes is equal to the sum of the wholesale price of cartons shipped from Alabama, the cost of transportation, handling and selling, plus a four percent (4%) tax per carton imposed by the Seminole Tribe, pursuant to its Ordinance No. C-1-7-78. This cost represents a considerable advantage over other cigarette



retailers who must include the $2.10 per carton tax which is paid by a qualified Florida distributor.

## CONCLUSIONS OF LAW

The issue is narrowly drawn from the opinion expressed in *Moe* v. *Salish and Kootenai Tribes*, 425 U.S. 463 (1976). The Supreme Court held that *Section 84-5606(1), Montana Revenue Code Annotated*, imposed a cigarette tax upon the ultimate consumer of cigarettes and that it was precollected by the retailer seller (Indian Smoke Shop) for convenience only. Under the facts of *Moe*, the Smoke Shop was ordered to collect the tax from the consumer/purchaser as it was the consumer and not the Indian, that benefited from the non-collection. The Court implied that the collection of the tax also not frustrate tribal government.

Indian law notwithstanding, the present case turns upon the interpretation of Chapter 210, Florida Statutes, and whether under the facts before the Court it is, as the State contends, an excise or privilege tax on the Florida wholesaler, or as Vending Unlimited insists, constitutes a tax upon the ultimate consumer which may be collected and remitted by the Smoke Shop.

The sale of cigarettes in Florida is based upon a three-tiered system of distribution. The manufacturer, as the top of the pyramid, sells cigarettes through its representatives (*Section 210.01(16), Florida Statutes*), to "distributing agents" (*Section 210.01(14) Florida Statutes*), and "wholesale dealers" (*Section 210.01(6), Florida Statutes*). The manufacturer's representative is similar to a "drummer" who takes orders and oversees deliveries but does not ship or store the commodity. The wholesaler (agent or dealer) is required by statute (*Section 210.15(1)(a), Florida Statutes*), to "affix or cause to be affixed" tax indicia representing the payment of the

tax to the State on every package of cigarettes it receives. (*Section 210.06(1), Florida Statutes*).

The agent or dealer is then required to sell its cigarettes to a retail dealer for resale purposes only.

*210.01 Definitions.*:

(7) "Retail dealer" means any person other than a wholesale dealer engaged in the business of selling cigarettes.

*210.15 Permits.*:

(1) (h) . . . Cigarettes may be purchased for retail purposes only from a person holding a wholesale dealer permit . . .

The distribution system separates the functions and activities of the wholesale and retail dealer. The retailer is not required to obtain a permit from the Division of Alcoholic Beverages & Tobacco, but is required to obtain a general retail sales permit from the Department of Revenue (*Section 210.15(1)(h), Florida Statutes*). The retailer does not collect or remit any cigarette taxes under the chapter. The retailer is not even permitted to possess untaxed cigarettes.

*Section 210.06 Affixation of stamps; presumption*:

(3) Whenever any cigarettes are found in the place of business of any such retail dealer . . . *without stamps affixed*, the presumption shall be that such cigarettes are kept in violation of the provision of law. (Emphasis supplied)

The assurance that the tax will be collected is based upon the regulatory scheme that places the burden of remitting the tax upon the wholesale dealer or agent.

Consistent with this concept is the following proscription directed toward the Division of Beverage:



*Section 210.15 Permits.*:

(2) The Division may not sell stamps or approve the use of meter machines to evidence the payment of taxes on cigarettes except to qualified wholesale dealers.

Vending Unlimited has not urged that the State sell stamps or approve the use of meter machines on cigarettes sold by the Smoke Shop, but such requirement is implicit. The proof of the collection of the tax is evidenced by the indicia appearing on each package. For the State to collect the tax it must be permitted to sell the indicia to the Smoke Shop. No party has suggested that the Shop is anything other than a retail outlet for cigarettes. *Section 210.04(9), Florida Statutes* states:

> *Agent* . . . shall purchase stamps and affix such stamps in the manner prescribed . . . in which case any *dealer* subsequently receiving such stamped packages of cigarettes will not be required to purchase and affix stamps on such packages of cigarettes. (Emphasis supplied)

This section is indication that the taxing incidence is focused at the dealer/agent level.

The tax itself is levied by *Section 2102, Florida Statutes (1977)*:

(1) An excise or privilege tax . . . is imposed upon the sale . . . possession . . . distribution and use of cigarettes in this state . . . (Emphasis supplied)

The original act was passed as *Chapter 21946, Section 2, Laws of Florida (1943)*. The first legislative expression emphasized that the tax placed upon cigarettes is an excise or privilege tax. The necessity for these terms is to distinguish the tax from a property or direct tax. In *City of Deland* v. *Florida Public Service Company, 161 So. 735, 738 (Fla. 1935)*, the Supreme Court said:

An indirect tax is a tax upon some right or privilege or corporate franchise, and is most often called an excise tax or occupational tax.

*Chapter 21946, Section 2,* began with the phrase:

. . . (E)very person . . . shall pay to the State of Florida *license* or excise taxes herein imposed . . . (Emphasis supplied)

The word "license" was later changed to "excise" in order to avoid the proscription against raising revenue in the guise of a license fee. Excise taxes have been construed to be the same as occupational taxes. See *Hi-Octane Terminal Company* v. *Panama City, 164 So. 2d 39, 40, 41 (Fla. 1st DCA 1964).*

The question is, therefore, upon which level of the distribution of cigarettes is the privilege tax levied? *Section 210.04(8), Florida Statutes,* reads in pertinent part as follows:

(8) Except as hereinafter provided, all agents (dealers) shall be liable for the collection and payment of the tax imposed by this chapter, and shall pay the tax to the division by purchasing . . . (tax indicia) . . . under such regulations as it shall prescribe . . .

The thrust of the cigarette law, reading the entire chapter as a whole, is to impose an excise tax on the wholesale level for the privilege of dealing in cigarettes. See *Sections 210.09(1)* and *210.13, Florida Statutes.*

Vending Unlimited has suggested that *Section 210.02 (6), Florida Statutes,* provides a basis for concluding that the tax is upon the ultimate consumer or purchaser. Even if the "privilege" tax is levied upon the consumer, which the Court believes it is not, *Section 210.02(6), Florida Statutes,* does not provide the answer the Petitioners seek.



This tax shall be paid by the dealer . . . upon the first sale or transaction within the state, *whether or not* such sale or transfer be to the *ultimate purchaser or consumer* . . . The seller or dealer shall be responsible for the collection of the tax and the payment of the same to the Division. *Whenever cigarettes are shipped from outside the state to anyone other than a distributing agent or wholesale dealer, the person receiving the cigarettes shall be responsible for the tax on said cigarettes and the payment of the same to the Division.* (Emphasis supplied) *Section 210.02(6)*

The tax must be remitted to the State upon the first sale or transaction. Under the other provisions of the chapter that first sale is the purchase by the wholesaler from the manufacturer's representative or out-of-state wholesaler. The reference to "seller" in the section quoted can only refer to a wholesaler. "Seller" is not defined elsewhere in the chapter and must be construed in pari materia with the intent of the section. Because a retailer may not possess non-taxed cigarettes, and the State may not sell tax indicia to a retailer, the word "seller" must refer to either a wholesale dealer or agent. This interpretation seems consistent with distribution system focused at the wholesale level.

Having found the tax to be an excise tax upon the privilege of dealing in cigarettes at the wholesale level it is unnecessary to consider whether the tax is a burden on tribal self-government. The relevant Indian law presented to the Court suggests that the State may not directly tax an Indian business on reservation land except where permitted to do so by treaty or congressional action. See *Bryan* v. *Itasca County, 426 U.S. 373 (1976); McClanahan* v. *State Tax Commission of Arizona, 411 U.S. 164 (1973); Mescalero Apache Tribe* v. *Jones, 411 U.S. 145 (1973); Moe* v. *Salish and Kootenai Tribes, supra.*

The State has offered the alternative construction of Chapter 210, that if the tax incidence is not upon the wholesaler, then it falls directly upon the Smoke Shop. Based upon the preceding discussion, the Court rejects that theory.

The Legislature simply has not contemplated the factual situation presented in this case. There is certainly a means to collect the tax in question by amending the act in line with the *Moe* decision. But the Court is unable to find the present ability of the State to obtain the tax from the Smoke Shop under the current law. It is therefore

ORDERED and ADJUDGED that the Petition for Writ of Mandamus is hereby denied.

DONE at Tallahassee, Florida, this 3rd day of March, 1978.

/s/ Charles E. Miner, Jr.
CHARLES E. MINER, JR.
Circuit Judge

Supreme Court, U. S.
FILED
MAY 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1978

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No. 78-630

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STATE OF WASHINGTON; CHARLES HODDE; JACK G. NELSON; AND ROBERT S. O'BRIEN,
*Appellants,*
vs.
CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; AND MAKAH INDIAN TRIBE,
*Appellees.*
STATE OF WASHINGTON,
*Appellant,*
vs.
UNITED STATES OF AMERICA AND CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,
*Appellees.*

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON**

---

# BRIEF OF AMICI CURIAE

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, ARIZONA PUBLIC SERVICE COMPANY, NEVADA POWER COMPANY, TUCSON GAS & ELECTRIC COMPANY, AND DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES

**IN SUPPORT OF APPELLANTS**

Frederick J. Martone
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Amici Curiae

**IN THE**

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**IN SUPPORT OF APPELLANTS**

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| *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958) | 21, 22 |
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| *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 90 S. Ct. 1990 (1970) | 23 |
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| *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 90 S. Ct. 791 (1970) | 23 |
| *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, 231 F.2d 89 (8th Cir. 1956) | 6, 20, 21 |
| *J. Gregory Merrion v. Jicarilla Apache Tribe*, Civ. No. 77-292 (D.N.M. Dec. 29, 1977) | 5 |
| *Kramer v. Union Free School District*, 395 U.S. 621, 89 S. Ct. 1886 (1969) | 23 |
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| *Morris v. Hitchcock*, 194 U.S. 384, 24 S. Ct. 712 (1904) | 17, 18, 19, 20, 21, 22 |
| *Nevada v. Hall*, 47 U.S.L.W. 4261 [U.S. Mar. 5, 1979] | 23 |
| *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011 (1978) | 5, *passim* |
| *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964) | 23 |
| *Salt River Project Agricultural Improvement and Power District, et al. v. Navajo Tribe of Indians, et al.*, No. CIV. 77-686 (D. Ariz., filed Sept. 1, 1977) | 3 |
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| *Trans-Canada Enterprises Ltd. v. Muckleshoot Indian Tribe*, Civ. No. C77-882M (W.D. Wash. Nov. 3, 1978) | 5 |
| *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109 (1886) | 7 |
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**IN THE**

**Supreme Court of the United States**

OCTOBER TERM, 1978

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No. 78-630

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STATE OF WASHINGTON; CHARLES HODDE; JACK G. NELSON; AND ROBERT S. O'BRIEN,
*Appellants,*
vs.
CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; AND MAKAH INDIAN TRIBE,
*Appellees.*
STATE OF WASHINGTON,
*Appellant,*
vs.
UNITED STATES OF AMERICA AND CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,
*Appellees.*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON**

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# BRIEF OF AMICI CURIAE

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, ARIZONA PUBLIC SERVICE COMPANY, NEVADA POWER COMPANY, TUCSON GAS & ELECTRIC COMPANY, AND DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES

**IN SUPPORT OF APPELLANTS**

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## INTERESTS OF THE AMICI CURIAE AND INTRODUCTION

The amici curiae[1] are joint tenants in the Navajo Project, a $600,000,000 coal-fired electric generation plant, located near Page, Arizona, on the Navajo Reservation. The amicus Salt River Project Agricultural Improvement and Power District is a political subdivision of the State of Arizona. The amicus Department of Water and Power of the City of Los Angeles is a department organized and existing under the charter of the City of Los Angeles, a municipal corporation of the State of California. The amici Arizona Public Service Company and Tucson Gas & Electric Company are public service corporations organized under Arizona law. The amicus Nevada Power Company is a public service corporation organized under Nevada law. Salt River Project owns 21.7% of the Navajo Project for its own benefit and holds 24.3% for the use and benefit of the United States of America intended for use by the Bureau of Reclamation of the Department of the Interior to meet its power needs for the Central Arizona Project. All amici are non-Indian entities. The United States, with the consent of the Navajo Tribe, granted the amici a right-of-way and easement for the project site and related facilities, and the tribe granted the amici an overlapping lease of the same land with the consent of the Secretary of the Interior.

Shortly after the Navajo Project's completion, the Navajo Tribe of Indians adopted resolutions purporting to tax (1) the Project's emission of sulfur compounds, (2) the Project's leasehold, and (3) the Project's gross receipts.

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[1] This brief is filed with the consent of all the parties to this case pursuant to this Court's Rule 42.



As a result, the amici are parties to litigation in the United States District Court for the District of Arizona challenging the validity of the tax on sulfur emissions.[2] The amount of this tax escalates to about $50,000,000 a year after five years. The amici's challenge to the leasehold interest tax is presently on appeal in the United States Court of Appeals for the Ninth Circuit.[3] Although the amici's claims against the validity of Navajo tribal taxation as to them are many, the dominant and common claim is that the dependent status of Indian tribes necessarily precludes their assertion of governmental authority over nonmember, non-Indian entities.

While the case before this court presents as its major issue the power of the *state* to tax non-Indian entities, there is lurking in the background the issue of tribal taxation of non-Indian entities. Two of the three judges of the district court below apparently held that tribal taxation of non-Indian entities preempted the power of the state to tax those same entities. Circuit Judge Kilkenny, in his separate concurring and dissenting opinion, would have held that even if the tribe could tax non-Indian entities, the state was not preempted from imposing its tax and found this case indistinguishable from *Moe v. Confederated Salish and Kootenai Tribes of Flathead Res.*, 425 U.S. 463, 96 S. Ct. 1634 (1976). Under his view, both the State of Washington and the tribe could tax.

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[2] *Salt River Project Agricultural Improvement and Power District, et al. v. Navajo Tribe of Indians, et al.*, No. CIV. 77-686 (D. Ariz., filed Sept. 1, 1977).

[3] *Salt River Project Agricultural Improvement and Power District, et al. v. Navajo Tribe of Indians, et al.*, No. 78-3492 (9th Cir., Appellants' Brief Filed April 9, 1979).

These amici submit that because the tribe is without power to tax non-Indians, there is neither preemption as found by the district court nor the prospect of dual taxation as inferred by the separate concurring and dissenting opinion. Only the State of Washington can tax non-Indians.

It may be possible for this Court to reverse the judgment of the district court and rule in favor of the State of Washington without deciding the question of the validity of a tribal tax on non-Indians. This is so because it is not clear from the tribal ordinances whether the legal incidence of their taxes falls on non-Indian purchasers or Indian sellers. These amici have no quarrel with tribal taxation of tribal members, be they sellers or purchasers. We do contend that the tribes have no power to impose taxes the legal incidence of which falls on non-Indian purchasers (upon whom the State of Washington imposes its tax) or on non-Indian sellers. But if the issue of tribal power to tax non-Indians is reached or even alluded to in this Court's opinion, it is of crucial significance that the non-Indians upon whom a tribal tax would fall are not parties to this case.

Indeed, the prospect of tribal taxation of non-Indians has greater consequences than the preemption of state law over non-Indians, although the substitution of the power of the tribe (in whose affairs non-Indians may not participate) for the power of the state is itself exceedingly damaging to the federal system. Pending before various federal courts are attempts by tribes to zone non-Indian owned fee patented land



within the boundaries of an Indian reservation,[4] to tax non-Indian utilities and political subdivisions of states,[5] and to tax non-Indian energy producers.[6] If this Court finds that the legal incidence of the tribal taxes in this case falls on non-Indians, the interest of these amici and their millions of non-Indian consumers, as well as the great number of non-Indians who would be affected by the assertion of tribal power over them, is in the reversal of the judgment of the district court on the basis that only the State of Washington may tax non-Indians.

## ARGUMENT

The court below found that the tribes were exercising federally delegated powers, which included the power to tax non-Indians. *Confederated Tribes of Colville v. State of Washington*, 446 F. Supp. 1339, 1361 (E.D. Wash. 1978). The court erred in two important respects.[7] We first show that the tribes' power of self-government does not include the power to tax non-Indian nonmembers. We then show that Congress has never delegated this power to the tribes.

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[4] *Trans-Canada Enterprises Ltd. v. Muckleshoot Indian Tribe*, Civ. No. C77-882M (W.D. Wash. Nov. 3, 1978).

[5] See text accompanying notes 2 and 3 *supra*.

[6] *J. Gregory Merrion v. Jicarilla Apache Tribe*, Civ. No. 77-292 (D.N.M. Dec. 29, 1977).

[7] At the time of the district court's opinion it was without benefit of this Court's opinions in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011 (1978), and *United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079 (1978), but when presented with these cases by Appellants' motions for new trial, the court below did not change its ruling. Appendix to Jurisdictional Statement, 77-80.

## I.

## TO THE EXTENT THAT THE LEGAL INCIDENCE OF A TRIBAL TAX FALLS UPON NONMEMBERS, THE TAX AS APPLIED IS INCONSISTENT WITH THE TRIBE'S DEPENDENT STATUS.

This Court recently resolved the troublesome issues of the source and scope of tribal power. Rejecting the expansive view of tribal self-government advanced by tribal advocates, this Court held that although the source of tribal power was not federal, the theater of its exercise was limited to tribal members, its residuum being insufficient to extend to nonmembers. *United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011 (1978).

In *Oliphant* a non-Indian was arrested by tribal authorities for violation of the tribe's law and order code. If, as the district court in the case before this Court held, the tribe possessed all governmental power except as expressly withdrawn by the Congress, the tribe had criminal jurisdiction over the non-Indian.[8] In holding that Indian tribes do not have criminal jurisdiction over non-Indians, this Court noted that tribal assertion of power over non-Indians was a new phenomenon and that it was the shared understanding of the lower federal courts, the executive branch, and the Congress that Indian tribes lacked such power. The Court conceded that Indian tribes "do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and

[8] The district court relied upon *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956), discussed *infra*. 446 F. Supp. at 1361.



announcing their dependence on the Federal Government," 98 S. Ct. at 1020, but rejected the proposed rule that a tribe's retained powers are such that they are limited only by specific restrictions in treaties or statutes. Instead, the Court held that:

> Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *"inconsistent with their status."* *Id.* at 1021 (emphasis in original).

The Court stated that by submitting to the overriding sovereignty of the United States, Indian tribes necessarily gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. *Id.* Finally, the Court stated that the tribe's assertion of authority over a non-Indian ignored the fact that there exists within the United States but two sovereigns: the United States and the states. *Id.* at 1022, quoting from *United States v. Kagama*, 118 U.S. 375, 379, 6 S. Ct. 1109, 1111, (1886).

*Oliphant* clearly rejected the assertion that a tribe possesses all powers except those expressly withdrawn by Congress, and held instead that the tribe was also without those powers inconsistent with its dependent status. *United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079 (1978), emphasizes what is *per se* inconsistent with a tribe's dependent status. At issue in *Wheeler* was whether the double jeopardy clause of the Fifth Amendment bars the federal prosecution of an Indian who has previously been convicted in a tribal court of a lesser included offense. If the source of tribal and federal power were the same, then jeopardy would attach and the subsequent criminal proceeding would be precluded. If, on the other hand, the source of tribal power were different than that of the United States,

the separate sovereignty doctrine would permit the second prosecution. The Court held that the source of tribal power to punish its own members was a part of its residual sovereignty and not a delegated federal power. *Id.* at 1088-89.

But what this Court said in *Wheeler* about the *scope* of tribal power was even more instructive than what it said about its *source*. The Court stated that the power of a tribe to punish its own members was not lost by virtue of its dependent status because

> [t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and *nonmembers of the tribe*. 98 S. Ct. at 1087 (emphasis added).

The Court noted that the limitation with respect to nonmembers rested on the fact that the dependent status of Indian tribes within the territorial jurisdiction of the United States is necessarily inconsistent with their freedom independently to determine their external relations. *Id.* at 1088. But since "the powers of self-government ... involve *only* the relations among members of a tribe ... they are not such powers as would necessarily be lost by virtue of a tribe's dependent status." *Id.* (emphasis added).

*Oliphant* and *Wheeler*, read together, produce the following. *Oliphant* instructs us that the tribe's retained powers are not only limited by specific restrictions in treaties or statutes, but also by its dependent status. 98 S. Ct. at 1021. *Wheeler* tells us that the assertion of tribal power over nonmembers is inconsistent with its dependent status because the power of self-government involves only relations among members of the tribe. 98 S. Ct. at 1088.



The district court did not even consider the dependent status of the tribe as a limitation on its power. Had it done so, it would have been unable to limit *Oliphant* in a principled way to criminal jurisdiction. The fundamental question in *Oliphant* was one of jurisdiction. The labels "criminal" and "civil" are the product of our own Anglo-American legal history and do not relate to jurisdiction, the power to act in the first instance. Doctrinally, a lack of criminal jurisdiction by definition means a lack of civil jurisdiction. As stated by Oliver Wendell Holmes in *Wedding v. Meyler*, 192 U.S. 573, 24 S. Ct. 322, 324 (1904), "jurisdiction, whatever else or more it may mean, is *jurisdictio*, in its popular sense of authority to apply the law to the acts of men." Clearly, if a tribe has no authority to apply its substantive criminal law to a non-Indian and enforce it with the coercive instruments of government, the tribe similarily has no power to apply civil regulatory and taxing authority to a non-Indian and enforce it with the coercive instruments of government. Surely the outcome cannot depend upon a labeling process describing conduct as criminal or in violation of civil regulatory power. Either the entity which purports to assert the power has authority to apply its law to the acts of men or it does not. As to an Indian tribe, *Oliphant* has answered this question.

That this Court would reject the assertion of tribal civil regulatory and taxing power and jurisdiction is clear from the assumptions articulated in its opinion. In rejecting the Suquamish Tribe's argument that a modification in the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (guarantees extended from "American Indians" to "any person"), confirmed inherent criminal jurisdiction over non-Indians, the Court said:

the modification merely demonstrates Congress' desire to extend the Act's guarantees to non-Indians *if* and *where* they come under a tribe's criminal *or civil* jurisdiction by either treaty provision or act of Congress. 98 S. Ct. at 1014 n. 6 (emphasis added).

This reference to civil jurisdiction was no casual dicta. This Court appreciated that its decision in *Oliphant* necessarily precluded tribal civil power over nonmembers as well as criminal jurisdiction, as indicated by the following exchange at oral argument:

> Question: Mr. Ernstoff, is there any way of distinguishing your case from a civil jurisdiction of the Tribe so that the Court could, in a principled way, say there was criminal jurisdiction here but not civil jurisdiction?
>
> Mr. Ernstoff [counsel for the Suquamish Tribe]: That is a very interesting question, Your Honor. I really do not know that they can, to be honest with you, I have been trying to do that because I thought it would be of benefit to me to come in with the most narrow case that I can possibly come in with.
>
> *To be intellectually honest, I do not think you really can and I do not think that you should.* Transcript of Oral Argument Before the United States Supreme Court in *Oliphant v. Suquamish Indian Tribe* at 54-55 (emphasis added).

Finally, the Court in *Oliphant* concluded with a profound observation which is as appropriate in the civil context as it is in the criminal context. The Court noted that the former federal policy of immunizing Indian peoples from the criminal jurisdiction of the United States was meant to avoid the unseemliness of judging culturally distinct peoples by standards "made by others and not for them" and of trying them "not



by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception." 98 S. Ct. at 1022, quoting from *Ex parte Crow Dog*, 109 U.S. 556, 571, 3 S. Ct. 396, 406 (1883). The Court then said "[t]hese considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents' contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedures." *Id.*

If it is wise to immunize reservation Indians from the legal obligations of a dominant culture foreign to their own (the laws of the states), but in whose political affairs they may participate as citizens, then by stronger logic it must also be unwise and surely unjust to subject nonmembers of the tribe to the legal obligations decreed by peoples foreign to them and from whose political affairs they are barred. To subject some racial or ethnic groups to the general lawmaking, taxing, and enforcing power held by another racial or ethnic group is offensive to our fundamental values.[9]

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[9] Indeed, this Court has fashioned rules which reach a tolerable balance. Just as reservation Indians are immune from state law, so too are non-Indians immune from tribal law. Were it otherwise, the balance would be upset.

## II.

## THE ANALYSIS EMPLOYED BY THE COURT IN *OLIPHANT* PRODUCES THE SAME RESULT IN THE CIVIL CONTEXT.

Although *Oliphant* and *Wheeler* alone preclude the power to tax, the same conclusion is inevitable from an application of the methodology of *Oliphant*. There, the Court held that because of the treaty-making process, congressional action, the presumptions shared by the Congress, the Executive, and the judiciary, and the overriding sovereignty of the United States, Indian tribes do not have inherent criminal jurisdiction over non-Indians.

With respect to the treaty-making process, the Court examined representative Indian treaties and found that their history was consistent with the principle that Indian tribes could not assume criminal jurisdiction over non-Indians without the consent of Congress. 98 S. Ct. at 1015 n. 8. The Court noted that no Indian treaty expressly granted tribal criminal jurisdiction over non-Indians.

Similarly, no Indian treaty expressly grants tribal civil regulatory authority or jurisdiction over non-Indians. See II C. Kappler, *Laws and Treaties* (1904). On the contrary, we have examined every Indian treaty and have found that *all* treaties which secure the right of self-government to Indian tribes, including *civil* power over persons and property, exclude persons (and their property) who are not by birth, adoption, or otherwise citizens or members of the tribe. Treaty with the Cherokee, art. 5, 7 Stat. 478 (1835); Treaty with the Choctaw and Chickasaw, art. 7, 11 Stat. 611 (1855); Treaty with the Creeks, art. 15, 11 Stat. 699 (1856); Treaty with the Seminole, art. 2, 14 Stat. 755



(1866).[10] *Cf.* Treaty with the Chickasaw, art. III, 7 Stat. 450 (1834); Treaty with the Comanche, et al., art. 2, 9 Stat. 844 (1846); Treaty with the Navaho, arts. VI, IX, 9 Stat. 974 (1849). As to treaties with tribes in the Indian Territory (Oklahoma), *e.g.*, Treaty with the Choctaw and Chickasaw, 14 Stat. 769 (1866), and Treaty with the Cherokee, 14 Stat. 799 (1866), see *Ex parte Mayfield*, 141 U.S. 107, 11 S. Ct. 939, 941 (1891). The scheme in the Indian Territory vested civil jurisdiction in tribal courts over actions in which *only* Indians were parties. Any action to which a nonmember was a party was to be brought in federal court. *Id.* at 941. Act of May 2, 1890, §§ 30, 31, 26 Stat. 81, 94. *Alberty v. United States*, 162 U.S. 499, 503, 16 S. Ct. 864 (1896). *See generally* F. Cohen, *Federal Indian Law* 382 (U.N.M. ed. 1942). There could be no better proof of the shared understanding of the executive and the congressional branches than these treaty and statutory provisions.

As to other congressional action, this Court traced the stages of congressional concern for crimes on the reservation, and concluded that while Congress never expressly prohibited tribal criminal jurisdiction over non-Indians, the absence of such jurisdiction was the underlying principle of congressional action. 98 S. Ct. at 1017-19. The Court noted that the Congress did not initially address itself to the problem of tribal jurisdiction over non-Indians for the reason that there was little reason to be concerned with assertions of tribal court jurisdiction over non-Indians in light of the absence of formal tribal judicial systems. *Id.* at 1017.

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[10] The relevant articles of these four treaties are reproduced in the Appendix to this brief.

For the same reason, Congress has not, except as noted above, addressed itself to the question of tribal civil regulatory power and jurisdiction over non-Indians for the reason that, until very recently, no tribe ever purported to have such jurisdiction. On the few occasions the Senate addressed tribal civil power and jurisdiction in the treaties cited above, it uniformly excluded civil regulatory power and jurisdiction over nonmembers.

The Court in *Oliphant* quoted a 1960 Senate Report which stated that *"Indian tribal law is enforcible against Indians only; not against non-Indians ... [n]on-Indians are not subject to the jurisdiction of Indian courts."* 98 S. Ct. at 1019 (emphasis in original), quoting from S. Rep. No. 1686, 86th Cong., 2d Sess. 2-3 (1960). The Court noted that the three branches of the federal government were in apparent agreement that Indian tribes do not have jurisdiction over non-Indians and quoted with approval the dissenting views of Congressman Lloyd Meeds, Vice-Chairman of the American Indian Policy Review Commission, that "such general jurisdiction has generally not been asserted and ... the lack of legislation on this point reflects a congressional assumption that there was no such tribal jurisdiction." 98 S. Ct. at 1019 n. 15, quoting from 1 American Indian Policy Review Commission, *Final Report,* at 587 (1977) (Dissenting Views of Cong. Lloyd Meeds).

The Court relied on *Ex parte Mayfield,* 141 U.S. 107, 115-16, 11 S. Ct. 939 (1891), for the proposition that congressional action in regulating jurisdiction on Indian reservations demonstrated an intent to forbid tribal jurisdiction over non-Indians. 98 S. Ct. at 1018-19. Yet *Mayfield* was not directed solely to criminal jurisdiction. In describing the jurisdiction of the tribe



and that of the United States the Court said:

> The general object of these statutes is to vest in the courts of the nation [Cherokee Tribe] jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side. 11 S. Ct. at 941.

With respect to the assumptions of the Executive Branch, its treaties, cited above, uniformly excluded tribal civil regulatory power and jurisdiction over nonmembers. More recently, Felix S. Cohen, former Assistant Solicitor of the Department of Interior, and author of the major treatise on federal Indian law, acknowledged that the jurisdiction of tribal courts was limited to Indians. F. Cohen, *Federal Indian Law* 148, 382 (U.N.M. ed. 1942). In short, a tribe has no jurisdiction to impose a tax on a nonmember non-Indian.

## III.

## ALL OTHER CASES INCLUDING THOSE RELIED ON BELOW IN SUPPORT OF TRIBAL TAXATION ARE INAPPOSITE.

The district court relied upon a single case to support tribal taxing power over nonmembers, and tribal advocates have relied on others in different settings. To properly understand those cases, two simple but fundamental distinctions must be drawn.

First, Congress does have the power to delegate its power over Indian affairs to an Indian tribe, where the delegation is not otherwise proscribed by the United States Constitution. Secondly, to the extent an Indian tribe may enjoy an interest in real property, the tribe would possess those nongovernmental powers of a proprietor normally associated with the particular real

property interest. So, for example, where a tribe enjoys a right to possession, whether by treaty, statute, executive order, or lease, the tribe would have the powers associated with a possessor of land. This would include a right to exclude others, a right to sue for trespass damages, and a right to condition entry by contract upon the payment of a fee or other exaction. These proprietary powers belong to any possessor of land in the United States, and are not true governmental powers.

Having made these observations, it is readily demonstrated that reliance on those cases to support tribal taxation of nonmembers is misplaced. The classical delegation case is *United States v. Mazurie*, 419 U.S. 544, 95 S. Ct. 710 (1975). There the Court held that since Congress has the power to regulate the sale of alcoholic beverages in Indian country and Indian tribes are entities with some independent authority over matters that affect the *internal* and social relations of tribal life, Congress could constitutionally delegate its own authority over alcoholic beverages to the tribe. Congress had enacted legislation allowing Indian tribes to regulate the introduction of liquor into Indian country as long as state law was not violated. Act of Aug. 15, 1953, 67 Stat. 586, 18 U.S.C. § 1161. Despite the denial of his application for a tribal liquor license, a non-Indian introduced liquor into Indian country. Accordingly, he was in violation of federal criminal law and subject to federal prosecution, not tribal prosecution, if the congressional delegation to the tribe were valid. While the Court upheld the congressional delegation to the tribe, it specifically stated that "[w]e need not decide whether this independent authority [the tribe's] is itself sufficient for the tribes to impose Ordinance No. 26 [requiring retail liquor



outlets within Indian country, including those on non-Indian land, to obtain a tribal license]." 95 S. Ct. at 718. Hence, far from supporting the assertion of tribal civil regulatory authority over non-Indians, *Mazurie* is a pure congressional delegation case, a principle recognized in *Oliphant* itself. 98 S. Ct. at 1022.

In this case, there is no express congressional delegation of federal power to the tribes upon which a claim to tax nonmember non-Indians can be based. Unlike *Mazurie*, there is no statute authorizing tribes to tax non-Indians. The district court found none, but instead relied upon the Indian Reorganization Act, 25 U.S.C. § 476, as to tribes organized thereunder, and upon the plenary power of Congress as to the others. 446 F. Supp. at 1361. But this Court has already acknowledged that the Indian Reorganization Act does not add to the existing powers of Indian tribes. *Oliphant, supra*, 98 S. Ct. at 1014 n. 6. And while it is true that Congress has plenary power over Indian affairs, it has not exercised that power to permit tribes to tax non-Indians. Plainly, the district court erred in seeking refuge in the delegation doctrine.

The tribe's real property rights are illustrated by *Morris v. Hitchcock*, 194 U.S. 384, 24 S. Ct. 712 (1904). There, non-Indian owners of cattle and other animals sued the Secretary of the Interior and other federal officials seeking to restrain them from removing their cattle from the lands of the Chickasaw Tribe. At issue was the Curtis Act, Act of June 28, 1898, 30 Stat. 495, under which no ordinance or resolution of the Choctaw or Chickasaw tribes affecting the land of the tribe or the rights of any person who had taken an oath of allegiance to the United States should be of any validity until approved by the President of the United States. Under the treaty between the Chickasaw Tribe and

the United States, the tribe had the right to exclude trespassers, and the United States had the duty to protect the tribe from non-Indians who were "not subject to their jurisdiction and laws." 24 S. Ct. at 713-14. The tribe enacted an ordinance imposing a tax on livestock owned by noncitizens of the tribe as part of its "power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain." *Id.* at 714. The ordinance of the tribe was approved by the President of the United States, and the Secretary of the Interior promulgated regulations incorporating the tribal ordinance and authorizing the Department of the Interior to remove livestock upon which the tax was not paid. Hence, the plaintiffs were attacking the power of the Secretary under regulations promulgated pursuant to express congressional authority. The Court upheld the power of the Secretary to remove the livestock on which the tax was not paid. It is to be noted that pursuant to the Secretary's regulations, the tax was to be paid to the United States and not to the tribe. *Id.* at 713.

Hence, *Morris* stands for the proposition that while an Indian tribe cannot subject non-Indians to its jurisdiction and laws, *id.* at 714, it can condition the presence of nonmembers on tribal lands, not as an act of governmental power, but merely as the power of a proprietor of land, and that the enforcement of such conditions must be pursuant to express congressional delegation. It is clear, therefore, that the tribal "tax" in *Morris* was not a tax imposed by the tribe in a governmental capacity, but rather was a trespass fee exacted by the tribe in its capacity as a proprietor of land seeking to impose conditions on entry. Even with respect to this proprietary power, the tribe had no power to enforce but required enforcement by the



United States. Obviously, where the tribe has no possessory interest in the relevant locus (such as land within Indian country not owned by the tribe, land which is owned but leased to others, and land to which conditions of entry have already been attached by contract, right-of-way, or otherwise), the tribe has no proprietary interest upon which a fee or other exaction can be based.

So, in a case as here where a tribe wants to earn income through the sale of tobacco to non-Indians on tribally occupied lands, a tribe may set the price at its choosing. If the non-Indian wants the product, he pays the price. If not, he can purchase elsewhere, just as in *Morris* he could choose to graze his cattle elsewhere. But a tribe cannot tax the non-Indian and enforce it in tribal court or elsewhere.

Cases in the lower federal courts have followed the *Morris v. Hitchcock* governmental/proprietary distinction. In *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), the Creek Tribe imposed a permit tax, approved by the President of the United States, for the privilege it offered noncitizens to trade within the borders of its reservation. The court described the exaction as more of the nature of a license than of a tax. *Id.* at 949. Relying on *Morris*, the court held that the tribe had the authority to require the payment of the tax as a condition precedent to the privilege of trading within the reservation and that the United States had the power to enforce the payment of the tax through the Secretary of the Interior. The court said that the "law of the Creek Nation was in legal effect a law of the United States, because it was authorized by treaties, acts of Congress, and judicial decisions of this nation." *Id.* at 956.

Hence, like *Morris*, *Buster* is a case in which an Indian tribe conditioned the presence of nonmembers on the reservation upon the payment of a license fee or tax. The court perceived the tax to be a federal tax, *id.*, and the United States was the proper party to enforce it. Where the conditions to the presence of nonmembers have already been imposed by lease or right-of-way, further conditions cannot be unilaterally imposed.

In *Maxey v. Wright*, 54 S.W. 807 (Ct. App. Ind. Terr. 1900), non-Indian lawyers brought an action against a United States Indian inspector seeking to enjoin him from collecting an occupation tax imposed by the Creek Tribe. The court upheld the tax, not as an incident of governmental power, but simply as part of the tribe's power to exclude trespassers or condition the presence of nonmembers on their reservation. Indeed, the court cited an opinion of the Attorney General which likened a similar tax to the right of a hotel keeper to prescribe rules and charges for persons who become his fellow occupants. *Id.* at 809. The enforcing authority was the United States, not the tribe, and the only remedy was the removal of the lawyer from the reservation as a trespasser. *Id.* at 812. Hence, it is clear that the Court of Appeals of the Indian Territory viewed the tax not as an act of government, but merely as a condition imposed by a landowner on one who had no right to be present on the land.

Two other cases from the United States Court of Appeals for the Eighth Circuit missed the governmental/proprietary distinction of *Morris*, but their holdings have been repudiated by the rule of *Oliphant*. 98 S. Ct. at 1021. In *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, 231 F. 2d 89 (8th Cir. 1956), relied upon by the court below, a reservation Indian brought



an action against his tribe in federal court seeking to enjoin the imposition of a tribal tax on his non-Indian lessee. Relying on *Buster* and *Morris*, the court upheld the power to tax. The court held that the tribal power to tax was not pretermitted by any federal statute and, therefore, still existed. Obviously, the court was in error for at least two reasons.

Its reliance on *Buster* and *Morris* was wholly misplaced. As shown above, *Buster* and *Morris* were cases of express congressional delegation and federal enforcement, and the "tax" was upheld as a proprietor's trespass fee, not an act of true governmental power. Neither congressional delegation nor federal enforcement was present in *Iron Crow*.

Secondly, and perhaps more importantly, to the extent that *Iron Crow* upheld tribal power because no federal statute withdrew it, the holding was repudiated by this Court in *Oliphant*. 98 S. Ct. at 1021. As shown above, *Oliphant* and *Wheeler* define the area of sovereignty which has not been divested as encompassing only those relationships between the tribe and its members. A tribal tax on nonmembers is inconsistent with the tribe's dependent status, and therefore cannot withstand the rule of *Oliphant* and *Wheeler*.

The Eighth Circuit showed similar confusion in *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958). There, the power to tax was based upon the tribe's proprietary rights in the land, not true governmental powers. The court relied upon *Buster* and *Morris*, both of which were cases involving congressional delegation, federal enforcement, and proprietary powers. Indeed, the tax in *Barta* went to the United States and not the tribe. Moreover, the case was brought by the United States on behalf of the tribe and not by the tribe itself. And, of course, like *Iron*

*Crow*, to the extent that the court ruled that the tribe had all powers not expressly withdrawn by Congress, *Barta* has been rejected by this Court in *Oliphant*. 98 S. Ct. at 1021.

To summarize, the pre-*Oliphant* cases relating to tribal taxation of nonmembers fall into two groups. *Morris v. Hitchcock* and its progeny merely uphold the tribe's right as a proprietor of land to condition entry, and do not uphold true governmental power. Where the conditions of entry have been established, the tribe is without power to change them. Even Felix S. Cohen acknowledged that *Morris v. Hitchcock* and its descendants were based upon the proprietary power of a tribe to exclude nonmembers, and not tribal self-government. F. Cohen, *Federal Indian Law* 266-67 (U.N.M. ed. 1942). Even as to proprietary powers, congressional delegation and federal enforcement were present.

The other group, the two Eighth Circuit cases, have confused proprietary rights with governmental powers. To the extent they uphold tribal governmental power over nonmembers, the principle upon which they are based has been rejected by *Oliphant*.

## IV.

## WISE PUBLIC POLICY MILITATES AGAINST THE ASSERTION OF TRIBAL CIVIL REGULATORY POWER AND JURISDICTION OVER NONMEMBERS.

Unlike any other governmental entity in the United States, an Indian tribe is a closed unit. Even a non-Indian owner of fee patented land within the boundaries of an Indian reservation is not and cannot be a member of the tribe. Indeed, to permit such membership would wholly frustrate the purpose of permitting



reservation Indians to make their own rules and be governed by them. As the Court implies in *Oliphant*, 98 S. Ct. at 1022, the exercise of general tribal power over nonmembers raises enormous constitutional problems. There is perhaps no constitutional value more central to our notion of political justice than the principle that subjection to governmental power presupposes the right to participate on an equal basis in the control of that power.[11] Government by consent of the governed is the central theme of American democracy. This Court recently stated that "[i]n this Nation each sovereign governs only with the consent of the governed." *Nevada v. Hall*, 47 U.S.L.W. 4261, 4266 [U.S. Mar. 5, 1979]. Non-Indian citizens of the United States have *never* consented to tribal governmental power. Indeed, it is the tribe and its members who have consented to government by the United States. Since tribal members have consented to tribal government, the exercise of extraconstitutional powers by the tribe over them (under *Wheeler)* creates no problem. But non-Indian Americans have consented to government *only* under the Constitution. The exercise of extraconstitutional powers by the tribe over them within the borders of the United States violates the social contract.

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[11] This central principle finds expression in the "one person, one vote" cases which hold that any general purpose governmental entity must allow equal franchise to all persons. *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 90 S. Ct. 1990 (1970); *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 90 S. Ct. 791 (1970); *Kramer v. Union Free School District*, 395 U.S. 621, 89 S. Ct. 1886 (1969); *Avery v. Midland County*, 390 U.S. 474, 88 S. Ct. 1114 (1968); *Cf. Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964).

This Court recognized that the exercise of tribal power over nonmembers would be an "unwarranted intrusion on their personal liberty," and is therefore precluded by the overriding sovereignty of the United States. *Oliphant*, 98 S. Ct. at 1021. The intrusion is enormous since the exercise of tribal power within its proper sphere is not generally constrained by the Bill of Rights,[12] and federal or state jurisdiction does not exist to entertain claims under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1970).[13] Since the tribe's interest in self-government is not a fundamental right, *Washington v. Confederated Bands and Tribes*, __ U.S. __, 99 S.Ct. 740, 761 (1979), any comparison of the interests at stake must result in the conclusion that tribes are without power to tax nonmember non-Indians.

## CONCLUSION

This is a case in which the major issue is the power of the state to tax non-Indians who purchase cigarettes on Indian reservations. Tribal power to tax non-Indians arises only in a collateral way and then only if this Court finds that the legal incidence of the tribal tax is on the non-Indian purchaser. Should this Court find that the legal incidence of the tribal tax is not on the non-Indian, then the issue of tribal taxation of non-Indians vanishes.

If, on the other hand, this Court finds that the legal incidence of the tribal tax falls on the non-Indian purchaser, then this case could implicate profoundly more important interests than the simple sale of cigarettes

[12] *United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079 (1978); *Talton v. Mayes*, 163 U.S. 376, 16 S. Ct. 986 (1896).

[13] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670 (1978).



to non-Indians on Indian reservations. Many non-Indians live on Indian reservations and others do business there. The assertion of tribal governmental power over non-Indians can occur and has occurred in manifold ways, each one of which implicates interests of compelling importance, including taxation without representation. If this Court reaches this issue, the Court must find that tribal self-government does not include the power to tax non-Indians.

The judgment of the district court must be reversed for the reason that either the legal incidence of the tribal taxes does not fall on the non-Indian purchaser, or, in the alternative, the power of the State of Washington to tax the non-Indian purchaser is not preempted by tribal taxation for the simple reason that the tribe has no power to tax non-Indian nonmembers.

Respectfully submitted,

Frederick J. Martone

JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Amici Curiae

May, 1979

## CERTIFICATE OF SERVICE

I, Frederick J. Martone, one of the attorneys for the amici curiae and a member of the bar of this Court, certify that all parties required to be served have been served with the foregoing brief; specifically, that on May 4, 1979, I caused to be deposited in a United States Post Office at Phoenix, Arizona, with air mail postage prepaid, three copies of the foregoing brief of amici curiae addressed to each of the following:

The Hon. Wade McCree, Jr.
Solicitor General
Mr. Stephen R. Barnett
Deputy Solicitor General
Department of Justice
Washington, D.C. 20530

Mr. Steven S. Anderson
Ziontz, Pirtle, Morisset,
Ernstoff & Chestnut
Pioneer Building
600 First Avenue
Seattle, Washington 98104

Mr. James B. Hovis
Hovis, Cockrill & Roy
P.O. Box 487
Yakima, Washington 98907



Mr. Richard H. Holmquist
Senior Assistant Attorney General
Department of Revenue
Temple of Justice
Olympia, Washington 98504

Frederick J. Martone

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## TREATY WITH THE CHOCTAW AND CHICKASAW, 1855.

* * *

ARTICLE 7. So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; *excepting, however, all persons, with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe,* and all persons, not being citizens or members of either tribe, found within their limits, shall be considered intruders, and be removed from, and kept out of the same, by the United States agent, assisted if necessary by the military, with the following exceptions, viz: Such individuals as are now, or may be in the employment of the Government, and their families; those peacefully travelling, or temporarily sojourning in the country or trading therein, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, *without becoming citizens or members of either of said tribes.* (emphasis added).

* * *

## TREATY WITH THE CREEKS, ETC., 1856

* * *

ARTICLE 15. So far as may be compatible with the Constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; *excepting, however, all white persons, with their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe;* and all persons not being members of either tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents for said tribes, respectively; (assisted, if necessary, by the military;) with the following exceptions, viz: such individuals with their families as may be in the employment of the Government of the United States; all persons peaceably travelling, or temporarily sojourning in the country, or trading therein under license from the proper authority of the United States; and such persons as may be permitted by the Creeks or Seminoles, with the assent of the proper authorities of the United States, to reside within their respective limits *without becoming members of either of said tribes.* (emphasis added).

* * *



## TREATY WITH THE SEMINOLE, 1866.

* * *

ARTICLE 2. The Seminole Nation covenant that henceforth in said nation slavery shall not exist, nor involuntary servitude, except for and in punishment of crime, whereof the offending party shall first have been duly convicted in accordance with law, applicable to all the members of said nation. And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color, *who may be adopted as citizens or members of said tribe.* (emphasis added).

* * *

## TREATY WITH THE CHEROKEE, 1835.

* * *

ARTICLE 5. The United States hereby convenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; *and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.* (emphasis added).

* * *

Supreme Court, U. S.
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In The

# Supreme Court of the United States

October Term, 1978

No. 78-630

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; and ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,

*Appellants,*

vs.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

*Appellees.*

STATE OF WASHINGTON,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

and

CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION,

*Appellees.*

**On Appeal from the District Court of the Eastern District of Washington**

## BRIEF OF THE STATE OF MONTANA AS AMICUS CURIAE

HELENA S. MACLAY
DEIRDRE BOGGS
KEITH C. RENNIE
Special Assistant Attorneys General
State of Montana
*Attorneys for Amicus Curiae*

P. O. Box 8957
Missoula, Montana 59807
Telephone: (406) 243-6264

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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—o—

**On Appeal from the District Court of the Eastern District of Washington**

—o—

## BRIEF OF THE STATE OF MONTANA AS AMICUS CURIAE

—o—

Pursuant to Rule 42 of the Supreme Court Rules, the State of Montana files this brief as *amicus curiae.*

—o—

## INTEREST OF THE AMICUS CURIAE

The *amicus curiae,* the State of Montana, has a vital interest in this case because the opinion of the three-judge District Court will result in the erosion of the State of Montana's authority to tax and regulate its citizens. In addition, the decision of the three-judge District Court gives unprecedented recognition to the power of tribes to tax non-Indians on reservations. The State of Montana has within its boundaries seven Indian reservations, on which many non-Indians reside and do business. The District Court's opinion gives Montana's tribes both the power and the incentive to tax non-Indians. This new power, which will certainly be exercised by all tribes, will inevitably result in non-Indians being required to pay taxes to tribes for the support of tribal governments in which non-Indians have no right to participate.

The District Court opinion will have far-reaching and disastrous effects upon Montana's citizens and government. Although the case deals only with tribal cigarette taxes, the three-judge District Court did not take into consideration the certainty that its holding will be applied to other reservations and taxation schemes. The State of Montana now has pending in the Court of Appeals for the Ninth Circuit the case entitled, *The Crow Tribe of Indians et al. v. The State of Montana, et al.,* No. CV-78-110-BLG, in which the Crow Tribe of Indians claimed that its tribal severance tax must preempt Montana's Coal Severance Tax. In that case, the District Court dismissed the complaint for failure to state a claim, and rejected the tribal preemption argument. At stake for the State of Montana are approximately 18 million dollars in severance taxes



which have been collected by the State of Montana since 1975. It is anticipated that coal production on the Crow Reservation will escalate, with increasing tax revenues being paid by coal producers (not the Indian Tribe) to the State of Montana.

The State of Montana will address only the issues of whether Indian Tribes can tax non-Indians, whether a tribal taxing ordinance can preempt valid state taxing authority, and whether a state tax levied on non-Indians operates as an interference with tribal self-government.

———o———

## SUMMARY OF ARGUMENT

The Washington cigarette sales tax is valid. Absent specific authorization by Congress, Indian Tribes have no authority to tax non-Indians. Since there is no Congressional act authorizing the tribal ordinances here, they cannot be applied to non-Indians purchasing cigarettes on the reservation. If valid, the tribal ordinances must be interpreted as imposed on the Indian retailers. There is no preemption of the state tax because there is no "governing act of Congress" which controls or taxes non-Indian purchasers of cigarettes on Indian reservations. Because the state cigarette tax is imposed on non-Indians, there can be no interference with tribal self-government, and the indirect economic ramifications of the state tax on tribal projects are completely irrelevant.

———o———

## ARGUMENT

### Tribal Ordinances Cannot Preempt State Taxing Authority Over Non-Indians

In *Moe v. Confederated Salish and Kootenai Tribes,* 425 U. S. 463 (1976), this court upheld Montana's cigarette sales tax as applied to on-reservation sales made by Indian tribal sellers to non-Indians. The Montana cigarette tax involved in *Moe* is so similar to the Washington cigarette tax as it operates on Reservations that it is clear that the State of Washington has the power to tax sales of cigarettes to non-Indians on Reservations. The question, then, is whether the existence of tribal ordinances which purport to levy a tax on the distribution of cigarettes by the Tribes necessarily invalidates the State power to tax.

The lower court in this case concluded that *Moe* was of little import because of the existence of the tribal ordinances. The court eliminated the State's power to tax non-Indians by relying on two legal theories:

(1) The state tax has been preempted by "governing acts of Congress" and (2) the state tax infringes "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee,* 358 U. S. 217, 220 (1959). The three-judge District Court relied upon each of these legal theories, in the alternative, in order to invalidate Washington's cigarette sales tax. In doing so, the District Court established an unlimited and previously unrecognized power of Indian Tribes to tax non-Indians on reservations.



### A. The District Court Misinterpreted the Tribal Taxing Schemes

The District Court's holding that the tribal ordinances preempted an otherwise valid state tax was grounded upon a conclusion that the legal incidence of the Tribal taxes falls on non-Indian purchasers of cigarettes (Appendix to Jurisdictional Statement 36, 37). This conclusion, however, is contrary to the provisions of the ordinances. For instance, the Colville Tobacco Ordinance, Section 8, states that the tribal tax is "levied . . . upon distribution of cigarettes and other tobacco products by the tribes." The tribal tax thus is levied upon the wholesale distribution of cigarettes by the Tribes to the retailers. The tax is due from the retailers upon receipt of cigarettes from the Tribe. The fact that the retailers pass the tax on to the consumer by means of a higher retail price does not transform the tribal tax into one levied on the consumer or on the retail sales transaction. Thus the lower court's conclusion that the tax falls upon the ultimate consumer is unfounded.

### B. Indian Tribes Have No Authority to Impose a Cigarette Sales Tax Upon Non-Indians

Not only did the District Court hold that the incidence of the Tribal sales tax fell primarily upon non-Indian purchasers of cigarettes, it also specifically held that Indian Tribes have the power to impose a tax on non-Indians (Appendix to Jurisdictional Statement 34).

Whatever authority Indian Tribes have to "make their own laws and be ruled by them." *Williams v. Lee, supra,* when Indian Tribes seek to exert governmental power over *non-Indians,* such power is extremely lim-

ited. The authority must either be inherent or there must be a specific Congressional act authorizing whatever governmental power a Tribe exerts over non-Indians. *Oliphant v. Suquamish Tribe,* 435 U. S. 191 (1978).

In *Oliphant* this Court said that because of their acknowledged dependence on the United States Government, Indian Tribes retain only elements of "quasi-sovereign" authority. Their relationship with the federal government necessarily strips Indian Tribes of many powers of sovereignty. This Court eschewed reliance on "inherent sovereignty" as a source of tribal authority and instead looked to the specific power sought to be exercised as an attempt to find some source for it. Finding no specific or implied authority for the proposition that an Indian Tribe has the power to exercise criminal jurisdiction over non-Indians who violate tribal law on the reservation, this Court held that no such power existed.

The distinct difference between a Tribe's authority over its members and a Tribe's limited authority over non-Indians was emphasized in *United States v. Wheeler,* 435 U. S. 313 (1978). *Wheeler* makes clear that the limited sovereignty of Indian Tribes does not include the power to regulate non-Indians.

The District Court apparently recognized that the Tribes do not inherently possess the power to tax non-Indians. The Court then correctly stated that the Tribes must obtain that power from Congressional delegation (Appendix to Jurisdictional Statement 32). However, the Court cited no specific statute delegating to the Tribes the power to tax non-Indians, and such a statute does not exist.



**C. The Tribal Taxing Ordinances, Whether Imposed on Indians or Non-Indians, Cannot Preempt Valid State Taxing Authority**

The legal basis for vitiating a state law because of federal preemption has been recently re-emphasized by this Court. In order to find preemption, there must be a showing of a "clear and manifest purpose of Congress" to supersede state powers. *Ray v. Atlantic Richfield Co.,* 435 U. S. 151, 157 (1978); *Douglas v. Seacoast Products, Inc.,* 431 U. S. 265 (1977); *Jones v. Rath Packing Co.,* 430 U. S. 519 (1977). Where a congressional enactment was passed to protect and guard its Indian wards, the state is free to regulate the same area in any manner that does not conflict with the federal act. *United States v. McGowan,* 302 U. S. 535 (1938); *Moe, supra.* Of primary importance is the existence of a "governing act of Congress" with which to compare the challenged state statute. *Mescalero Apache Tribe v. Jones,* 411 U. S. 145, 148 (1973); *Warren Trading Post v. Arizona Tax Commission,* 380 U. S. 685, 690 (1965); *Williams v. Lee,* 358 U. S. 217, 220 (1959).

The legal incidence of the challenged state tax falls directly and exclusively on non-Indian purchasers of cigarettes. Unless there is some congressional act which taxes or controls non-Indians purchasing cigarettes on an Indian reservation, the threshhold requirement of preemption cannot be met. Such an act does not exist. A tribal ordinance simply cannot oust state jurisdiction. Neither a tribal ordinance nor the signature of the Secretary of Interior rises to the level of a "governing act of Congress" which is necessary to find a clear and manifest purpose of Congress to supersede state powers.

Even if a tribal ordinance is equivalent to an act of Congress, the ordinance cannot have any more preemptive effect than it would if enacted by Congress. Accordingly, the tribal tax only affects the operation of such state law as is in direct conflict with it. *McGowan, supra; Moe, supra.* There is no conflict in this case. The Tribes have charged fees and imposed taxes which are levied and become due and payable at the time the retailers receive the cigarettes from the Tribes. The taxable event has occurred before the cigarettes are made available for purchase by non-Indians. There can be no conflict, therefore, if the state chooses to later tax non-Indian purchasers of those previously taxed cigarettes. Thus the tribal tax on the Indian distributor cannot preempt the state's tax on the non-Indian purchaser.

**Washington State's Cigarette Taxing Scheme Does Not Constitute an Interference With Tribal Self-Government**

The Tribes have claimed that the imposition of the State of Washington's cigarette sales tax upon reservation sales of cigarettes sold to non-Indians interferes with tribal self-government. The thrust of the Tribes' argument is as follows:

(1) Because of the state tax, the tribal sales tax is virtually inoperative. If the state tax must be paid, the tribal cigarettes lose their economic advantage and sales are drastically reduced.

(2) Because there are no reservation sales to non-Indians, the Tribe collects nothing from its own tax.

(3) Because there is no cigarette sales tax revenue, the Tribe's governmental projects are crippled.



*Williams v. Lee,* 358 U. S. 217 (1959) set out the test to be used in determining the extent and validity of a state's jurisdiction on Indian reservations when non-Indians are involved in on-reservation activities. The *Williams* test simply involves a determination of whether or not, absent governing acts of Congress, the state's action "infringes on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. This Court noted in 1973 that this test was to be used to resolve conflicts between Indians and non-Indians on a reservation. In this situation where "both the Tribe and state could fairly claim an interest in asserting their respective jurisdictions," the state may protect its interest up to the point where tribal self-government is affected. *McClanahan v. Arizona State Tax Commission,* 411 U. S. 164, 179. If there is no infringement by the state, then the state has jurisdiction to act.

This Court has never applied the *Williams* "infringement" test to reach the conclusion of the lower court. Adverse but indirect economic effects on tribal budgets do not meet the *Williams* "infringement" test.

If the lower court's holding is affirmed, the result is far-reaching and uncontrollable. A Tribe could enact revenue-producing taxation ordinances of any nature affecting non-Indians, no matter how far removed from essential tribal rights of self-government and no matter how invalid. The Tribe could show that the resulting revenue was essential to tribal budgets and therefore to governmental functioning. The Tribe could then insist that a state's action in the same area was a prohibited "infringement" if the state's action diminished the

Tribe's revenue. These results are not minimized in any way either by the District Court's assumption that the state's burden of supplying services on Indian reservations *may* be reduced when a Tribe supplies services to its members; by the District Court's assurances of tribal self restraint; or by its assurances that Congress and the Secretary of Interior could prevent or limit such tribal enactments (Appendix to Jurisdictional Statement 36).

If the lower court's reasoning is to be followed, the State of Washington would be prohibited from repealing its cigarette tax all together. Such an action would cause the price of cigarettes off the reservations to fall below those taxed by the Tribes. This would severely reduce revenue to the Tribes and interfere with tribal self-government. Clearly this is not the kind of "infringement" which is encompassed in the *Williams* test.

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## CONCLUSION

The opinion of the three-judge District Court should be reversed. The Washington cigarette sales tax should be found valid with regard to reservation sales of cigarettes to non-Indians. The District Court's vast expansion of the *Williams* "infringement" test should be soundly rejected. The holding in *Moe v. Confederated Salish & Kootenai Tribes, supra,* should be reaffirmed, and the theory that Tribes may preempt valid state taxes merely by enacting similar taxes should be rejected.



Dated this 30th day of April, 1979.

Respectfully submitted,

HELENA S. MACLAY
DEIRDRE BOGGS
KEITH C. RENNIE
Special Assistant Attorneys General
State of Montana
*Attorneys for Amicus Curiae*

IN THE

# Supreme Court of the United States

Supreme Court, U. S.
FILED
JUL 2 1979
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1978
NO. 78-630

STATE OF WASHINGTON, et al
Appellants,
v.
CONFEDERATED TRIBES OF THE COLVILLE
INDIAN RESERVATION, et al
Appellees.

STATE OF WASHINGTON,
Appellant,
v.
UNITED STATES OF AMERICA AND CONFEDERATED
BANDS AND TRIBES OF THE YAKIMA
INDIAN NATION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF OF AMICI CURIAE
QUINALT INDIAN NATION, COEUR D' ALENE TRIBE;
KALISPEL TRIBE; LOWER ELWA TRIBE, MUCKLESHOOT
INDIAN TRIBE; PORT GAMBLE KLALLAM TRIBE; PUYALLUP
INDIAN TRIBE; QUILEUTE INDIAN TRIBE; SHOALWATER
BAY INDIAN TRIBE; SKOKOMISH INDIAN TRIBE, SQUAXIN
ISLAND INDIAN TRIBE; SUQUAMISH INDIAN TRIBE;
SWINOMISH TRIBAL COMMUNITY

IN SUPPORT OF APPELLEES

MICHAEL TAYLOR
Reservation Attorney
Quinault Indian Nation
Counsel for the Amici

Office and PO Address:
PO Box 1118
Taholah, WA 98587

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

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# BRIEF OF AMICI CURIAE QUINALT INDIAN NATION, COEUR D' ALENE TRIBE; KALISPEL TRIBE; LOWER ELWA TRIBE; MUCKLESHOOT INDIAN TRIBE; PORT GAMBLE KLALLAM TRIBE; PUYALLUP INDIAN TRIBE; QUILEUTE INDIAN TRIBE; SHOALWATER BAY INDIAN TRIBE; SKOKOMISH INDIAN TRIBE; SQUAXIN ISLAND INDIAN TRIBE; SUQUAMISH INDIAN TRIBE; SWINOMISH TRIBAL COMMUNITY

IN SUPPORT OF APPELLEES

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## INTEREST OF THE AMICI

The amici have received the consent of all parties to this appeal for the filing of this brief.

The amici are Native American Tribes and Nations with reservations in the Pacific Northwest. Each of the amici raises tax revenue through the regulation and taxation of on-reservation tobacco sales to Indians and non-Indians. In addition, the Lower Elwa, Muckleshoot, Quileute, Quinault, Port Gamble and Squaxin Island Tribes, through the operation of exclusive tribal enterprises, realize all net proceeds from the sale of tobacco products. Proceeds realized by these exclusive tribal enterprises are retained by the tribal governments. Tax revenue and net proceeds accordingly derived from the regulation of on-reservation tobacco sales provide the amici with critically needed funds for the support of their tribal governments and services provided by the tribal governments. The amici's legitimate interest in deriving revenue for the support of tribal government from the taxation of reservation based



tobacco sales would, as the appellants admit, be frustrated if the state could regulate the same transactions. Imposition of the state tax would likewise frustrate the policy of the United States which is to encourage the development of tribal governments so as to increase their capacity to provide for the political and economic dignity of Indians. See, e.g., Indian Self-Determination and Education Act, 25 U.S.C. §450 et seq.; Indian Financing Act, 25 U.S.C. §1451 et seq. Decision of this case will affect the ability of the amici to support effective tribal governments and to provide programs that meet the human needs of reservation residents.

## SUMMARY OF ARGUMENT

Indian reservations are homelands for Indians. To govern these reservations effectively, Indian tribes must have revenue.

Revenue from the regulation and taxation of on-reservation tobacco sales has provided the amici with critically needed revenue. Revenue from tobacco sales has been used by tribal governments in a variety of important ways.

The power to regulate trade with the Indian Tribes is committed to Congress by the Constitution. The appellants' effort to subject Indian tribes to the state's regulatory and taxing scheme violates the sovereignty of the Indian tribes. The power to regulate commerce with the Indian tribes should be left to Congress, not the states.

## ARGUMENT

### I.
### The Purpose of Indian Reservations

The setting aside of Indian reservations as homelands for the Indian tribes is the keystone of United States Indian law. These reserves were intended to protect the Indian tribes from encroaching non-Indian society. To this end, the treaties negotiated with the Indian tribes of the Pacific Northwest provided that the reservations were set aside for the exclusive use of the Indian tribes. For example, Article II of the treaty of Medicine Creek, I Kappler, Indian Affairs and Treaties 918-19 (2d ed. 1904), assured the tribes joining that treaty that their reservations would be:



> for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent . . . .

Article II of the treaty between the Quinault and Quileute Indians and the United States contains nearly identical language. 12 Stat. 971-74. See also Article II of the Treaty of Point Elliott, 12 Stat. 927. In Williams v. Lee, 358 U.S. 217 (1959), this Court interpreted the treaty with the Navajos which "set apart" as their "permanent home" a portion of their ancestral lands. "Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in Worcester v. Georgia, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." Id. at 221-11.

The establishment of reservations was intended to protect and enhance the political and economic dignity of Indians. Chief Justice Marshall recognized this stating that the Indian nations were "distinct political communities, having territorial boundaries, within which their

authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged but guarantied by the United States." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832), quoted in McClanahan v. Arizona Tax Commission, 411 U.S. 164, 168 (1973). That tribal governments retain today the power to provide for the economic welfare of reservation residents was reaffirmed in Williams v. Lee.

In order to support these tribal governments, and the programs they provide, it is essential that tribal governments raise revenue.[1] Traditionally, governments raise needed revenue by taxation. That the power to raise revenue is essential to the vitality of government was recognized by The Federalist, No. 30.

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[1] Like states, the tribes rely to some extent on federal grants and contracts for revenue. Federal funds are insufficient, however, to provide for all, or even most, of the revenue needed by tribal and state governments. Too great a dependence on federal funding would, in any event, have a debilitating effect on the independence and self-government of both tribal and state governments. Tribal and state governments, being closer to the communities they govern, are better equipped to assess and satisfy the public wants.



> Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of it, as far as the resources of the community permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue: either the people must be subjected to a continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and, in a short course of time, perish.

## II.
## Utilization of Tobacco Revenue By Tribal Governments

The amici tribes determined that they could generate critically needed reveune by regulating and taxing the on-reservation sale of tobacco products to Indians and non-Indians. Seven of the amici have raised revenue in this manner since at least 1974.[2] While several of the amici also raise some revenue through the regulation and taxation of fishing and other business activities

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[2] Coeur d' Alene, Lower Elwa, Muckleshoot, Quileute, Puyallup, Suquamish, and Swinomish.

taking place within their reservations,[3] some of the other amici reservations are so small and underdeveloped that the regulation and taxation of on-reservation tobacco sales presently is the only practical way of raising revenue for the support of tribal governmental programs.

Most of the amici tribes have reservations in rural and semi-rural areas. Reservation communities are generally small, scattered and isolated. Revenue from the regulation and taxation of on-reservation tobacco sales has enabled the tribes to provide these communities with government services. Comparable state services, even if available and otherwise adequate to meet the particular needs of reservation residents, are usually provided at inconvenient locations so far distant from reservation communities at to be practically unavailable.

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3 E.g., Quinault Tribal Code (Q.T.C.) §§51.03.01-51.03.03 (fishing permits); Q.T.C. §§51.07.01-51.07.05 (clam digging permits); Q.T.C. §§40.01; 40.04-40.07 (business license and tax). The regulations apply to Indians and non-Indians.



In too many cases, therefore, the tribes are the only governments both willing and able to provide services to reservation residents.[4]

Some examples of how the amici utilize their tobacco revenue emphasize these points.[5]

Law Enforcement: The protection of society through the provision of police services is one of the most fundamental of all governmental powers. The prevention of crime and the apprehension of criminal suspects is a high governmental priority in any society which values the rule of law.

The amici's allocation of tobacco revenue emphasizes their concern for law enforcement. In

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4 The Quinault Indian Nation, for example, provides the following services, among others, to both Indian and non-Indian reservation residents: police protection; fire protection; emergency medical transport; lake patrol; Head Start; library; youth summer camp; roads; sanitation; social services; emergency health care; recreational facilities; alcohol counseling; senior citizen lunch program; youth counseling; judicial services; day care; and building inspection.

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5 Appendix A to this brief is a study of the amici's tobacco ordinances. This study is the source of most of the data which follows.

1977 and 1978, the Puyallup Tribe spent $91,800 of its tobacco revenue on tribal law enforcement. Law enforcement expenditures of $14,920 were made by the Swinomish Tribe in 1977 and $16,240 in 1978 for upkeep on patrol cars, gasoline purchases, radio equipment, uniforms and insurance for the officers. The Muckleshoot Tribe spent $10,621 in 1977 on law enforcement for salaries, to purchase gasoline for patrol cars and boats, and for officers' insurance and supplies. Also in 1977, the Muckleshoot Tribal police department was able to increase its coverage from 16 hours to 24 hours per day. Expenditures for law enforcement were also made in 1977 and 1978 by the Shoalwater and Suquamish Tribes. Cases investigated by tribal police include vehicle and other thefts, assaults, alcohol and related crimes, domestic disputes, juvenile problems and suicide prevention. In addition, because tribal police are located on-reservation, they are often the first police agency to arrive at accidents on state highways located on the reservations. Tribal law enforcement efforts therefore provide valuable asistance to state law enforcement



agencies in the rural and semi-rural areas where most Indian reservations are located.

Operating Expenses of Tribal Council (Legislature): Tribal Councils are the legislative bodies governing Indian tribes. They play a central role in the political life of Indian tribes by enacting laws which establish the policies that guide tribal administrators. Members of tribal councils are consulted by Congress and members of the Executive Branch of the United States government on matters affecting Indian tribes. The Muckleshoot Tribal Council utilized $18,277 of tobacco revenue to cover the costs of testifying at Congressional hearing in Washington, D.C., to register and attend regional policy meetings, and to conduct Business Committee (Tribal Council) meetings.

Tribal Courts: As this Court recently observed in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978), tribal courts "have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both

Indians and non-Indians." Tribal courts also expend substantial time in handling criminal cases. In order to provide for the enforcement of its civil and criminal laws, a sovereign must have a court system. The Muckleshoot, Skokomish and Suquamish Tribes have supported their tribal court systems with tobacco revenue.

Tribal Administration: The day-by day-affairs of tribal governments, like their federal and state counterparts, are carried-out by their executive officers or administrators. Salaries of administrators supervising tribal programs were funded with tobacco revenue by the Port Gamble Klallam, Puyallup, Skokomish and Swinomish Tribes. The Muckleshoot and Puyallup Tribes also used tobacco revenue to pay legal expenses.

In addition to using tobacco revenue to pay the salaries of tribal administrators, tobacco revenue was used by several of the amici to cover operating and overhead expenses in various tribal programs. The Lower Elwha, Muckleshoot, Port Gample Klallam, Puyallup, Shoalwater, Skokomish, Squaxin Island, and Suquamish Tribes also relied on



tobacco revenue to cover temporary cash flow problems in tribal budgets.

Education: The education of children is one of the most important services any government can provide. In state run public schools, however, Indian children often fall 2-to-3 years behind their non-Indian counterparts in achievement levels. I American Indian Policy Review Commission, Final Report 402 (1977). All revenue derived by the Coeur d' Alene Tribe from its regulation and taxation of tobacco sales is used to help operate a tribal school which began operation in 1974. Approximately one-third of the school's operating expenses are paid for out of revenue derived from the Tribe's regulation and taxation of tobacco sales. Fifty-five children enrolled in the pre-school program and 88 - 100 children are enrolled in grades K through 8. A majority of the school's teachers and its principal are Indian. The school is oriented to the Couer d' Alene culture.

The Muckleshoot Tribe spends part of its revenue to support its Johnson - O'Malley Program which places Indian teachers' aides and counselors

in public schools used by tribal children. The Tribe also provides tribal children with books, school supplies and gym clothes. Tax revenue has been used by the Muckleshoot Tribe to support its Title IV Adult Education Program and to support other tribal programs which were underfunded for indirect costs by federal aid programs.

The Puyallup Tribe supports its Tribal School District with tobacco tax revenue. There are three schools in the system with 270 - 275 children in the Head Start Program through grade 12. In addition, 50 sutdents are on the waiting list for the tribal high school and 60 are on the waiting list for the pre-school program. The tribal education program's success is attributed in part to its orientation to the tribal culture and heritage, an orientation not found in nearby public schools.

One-half of all funds derived by the Shoalwater Tribe from its tobacco sales tax go to the Tribal Education Foundation which is distributed to needy students in the form of scholarships.

The Skokomish Tribe deposits its tax revenue into a general fund which is used to pay the



salaries of several tribal administrators, including those supervising a learning center for 30-40 students and an Indian language program serving 60-70 persons.

Fisheries Management: From time immemorial, members of the amici tribes have depended on fishing both for subsistence and as a basis of commerce. The right to take fish is protected by their treaties. The right to fish remains important today to the culture and economy of the amici tribes. Several of the amici have spent tobacco revenue on fisheries management and enhancement: Muckleshoot ($21,565); Puyallup ($66,700); Shoalwater ($600); Skokomish; Squaxin Island; and Swinomish ($7,680). In 1979 the Squaxin Island Tribe made loans to tribal fishermen who were unable to get loans from the Bureau of Indian Affairs. The Puyallup Tribe used some of its tobacco revenue in 1977 as start-up costs for a tribal fish cannery which employes 30 tribal and Japanese workers.

Community Services: The impoverished nature of the amici's reservations creates special demands

for community services. Funerals were provided for the deceased with tobacco revenue by the Muckleshoot, Shoalwater and Skokomish Tribes. Land for H.U.D. housing for tribal members was purchased by the Squaxin Island Tribe in 1977 with $31,839 in tobacco revenue. Housing needs were also provided for by the Muckleshoot Tribe with $11,879 in tobacco revenue. Overhead and administrative costs for the operation of a tribal health clinic serving 75-to-125 people per week were financed with Muckleshoot Tribal tobacco revenue. Other community services provided by the amici with tobacco revenue included dinners for senior citizens, smoke-fire alarms for homes, garbage collection, construction and operation of recreational facilities, youth programs and cultural preservation.[6]

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[6] Some of the statutes adopted by the amici establish catagories for which the use of tobacco revenue is authorized. Section 209 of the Skokomish statute authorizes such use for enforcement of the tobacco statute; educational, recreational, and cultural activities; planning and administration of economic development for the reservation community; land use planning, administration of land use controls, and natural resource management and conservation efforts; water, sewer, solid waste disposal, and fire protection services; police protection and administration of justice; development and protection of archeological resources; and tribal administrative services necessary for implementation of any of the above programs and services.



Impact on State Financial Services: A number of services provided by the amici compliment comparable state efforts. Tribal fisheries programs, for example, by sound management of wild salmon and steelhead runs and the release of hatchery fish enhance the number of fish in Washington waters. Only a few of the fish the tribes release ever return to be harvested by the tribes. Many others are caught by non-treaty fishermen, thereby contributing to the commercial and recreational value of Washington waters. In other cases the amici provide services which would otherwise have to be provided by the states. The Coeur d' Alene and Puyallup Tribal Schools underwrite educational expenses that would otherwise be borne by the states in the public schools.

## III.
## Congress Has The Power To Regulate Trade With The Indian Tribes, Not The States

The appellants in their brief argue that the State of Washington should be given plenary authority to regulate the Indian tribes in their own regulation and taxation of on-reservation tobacco sales to Indians and non-Indians. The power to regulate trade with the Indian tribes, however, is textually committed to Congress by Article I, section 8, clause 3 of the United States Constitution. The appellants ask for nothing less than a judicial amendment to the Constitution so as to empower the States, or at least Washington State, to regulate trade with the Indian tribes. What the appellants seek is the evil the Indian Commerce Clause was designed to avert.

As the records of the Constitional Convention show, the power to regulate commerce with the Indian Nations was reserved to Congress because the individual states, under the Articles of Confederation, had engaged in war and made treaties with Indian tribes, thereby threatening the political relations of the United States with powerful Indian



tribes. 1 M. Farrand, The Records of the Federal Convention of 1787, at 316, 326, 330 (1911); 2 M. Farrand, at 548. By reserving to the Congress the power to regulate commerce "with" both "foriegn Nations" and "Indian Tribes," the Constitution provided Congress with plenary power to control those matters affecting the political relations of the United States in its affairs with soveriegn governments which owed no allegiance to the individual states.

As domestic, dependent nations, the amici owe no political loyalty to the seperate states. The amici's political obligations run to the United States. As was true in years past, there is today considerable friction between the tribes and the states. The Constitution, however, vests in the Congress, not the seperate states, political power to regulate trade with the Indian tribes. The appellants, nevertheless, ask this Court to hold that the states may regulate trade with the Indian tribes. Because that power is Constitutionally committed to the considered judgment of Congress, this Court should reject the appellant's argument.

In order to conserve the Court's time, the amici refrain from making argument on the other issues raised on this appeal. Those issues are treated fully in the respondents' briefs.

Respectfully submitted,

Michael Taylor
Reservation Attorney
Quinault Indian Nation

Council for the Amici

Of Counsel:

Robert D. Wilson-Hass
Reservation Attorney
Squaxin Island Indian Tribe
Route 1, Box 257
Shelton, WA 98584

Alexandra Harmon
Skokomish Indian Tribe
Route 5, Box 432
Shelton, WA 98584

John H. Clinebell
Law Office
Puyallup Indian Tribe
2232 E. 28th Street
Tacoma, WA 98404

Peter J. Wilke
Dona'd S. Means
Swinomish Tribal Law Office
Swinomish Tribal Comminity
PO Box 817
LaConner, WA 98257



E. Charles Routh
Houger, Garvey & Schubert
30th Floor
Bank of California Center
Seattle, WA 98164
Counsel for the Quileute Indian Tribe

Jeffrey S. Schuster
Russell W. Busch
Cynthia Davenport
Native American Project
Evergreen Legal Services
506 Second Avenue
Seattle, WA 98520
Counsel for Lower Elwa, Port Gamble
Klallam, and Shoalwater Tribes

Rosemary J. Irvin
Tribal Attorney
Suquamish Indian Tribe
PO Box 498
Suquamish, WA 98392

Allen H. Sanders
Richard Reich
Reservation Attorneys
Muckleshoot Administration Building
39015 172nd Ave., SE
Auburn, WA 98002

Robert D. Dellwo
Dellwo, Rudolf & Schroeder
1016 Old National Bank Building
Spokane, WA 99201
Counsel for the Coeur d' Alene
and Kalispel Tribes

# APPENDIX A

# A STUDY OF TRIBAL TAXATION AND SALES OF TOBACCO PRODUCTS ON 13 RESERVATIONS IN WASHINGTON AND IDAHO

BY

Toni Sheldon
Tim Sheldon

May 4, 1979

## INTRODUCTION

This is a study done by Toni and Tim Sheldon gathering factual information concerning tobacco taxation and sales on the reservations of the amici in Washington and Idaho.[1] Each of these tribes regulates and taxes the sale of tobacco products. Tribal taxes imposed on tobacco products vary in amount and in method of assessment. A common assessment method is a tax rate per carton of cigarettes and is added to the retail price. Taxes levied in this manner range from $.25 per carton collected by the Coeur d'Alene Tribe to $.60 per carton collected by the Muckleshoot Tribe. All tribes, except Coeur d'Alene, that tax in this per carton manner also levy a tax as a percentage of wholesale or retail price on other tobacco products. These taxes vary from 5 percent of wholesale price at Skokomish to 10 percent of the retail price at Quinault.

Another method commonly used for taxing is to designate a percentage of the wholesale or retail price as the tax rate covering both cigarettes and other tobacco products. Tax rates range from 1 percent of retail sales price at Shoalwater Bay to 5.5 percent of retail sales price at Swinomish.

Tribes that operate tobacco shops on a tribal basis frequently collect all net profit of the shop as tax revenue. Taxing on this basis are Lower Elwha and Port Gamble Klallam. Other tribal shops, Suquamish and Squaxin Island, tax a set

rate per carton of cigarettes or a percentage of retail price in addition to all net profit.

Tobacco sales on the reservations take place in tribally owned outlets as well as tribally licensed outlets. On one reservation, Quinault, individuals operate contrary to the tribal ordinance limiting sales to tribal outlets. Tribal Court action to close these shops has begun.

The tribes regulate sales of tobacco products by means of tribal tobacco ordinances. In addition to taxing these ordinances frequently require annual license fees from operators of individual shops and require that a Federal Indian Trader's License be obtained. Many ordinances prohibit sales to persons under 18 years of age, authorize tribal police to enforce the ordinance and set penalties for violators. Most ordinances require individually licensed operators to be enrolled members of the tribe.

In addition to tax revenue for funding tribal programs, tobacco sales create much needed jobs on the reservations. Western Washington's 21 recognized tribes were plagued by a 48.5-percent overall unemployment rate in 1978 according to BIA statistics.[2] Tribal members often receive on-the-job training as sales clerks in tobacco shops. This training is from their peers and many members would be reluctant to attend an off-reservation training program.

The majority of tobacco outlet jobs are for semi-skilled people. This fills a need as most reservation residents



are unskilled or semi-skilled. Many tribal members are engaged in seasonal fishing and logging occupations and tribal tobacco outlet jobs held by their spouses are often the only family income in slack periods. Obligations such as house and car payments and food purchases must be maintained year-round.

In addition to semi-skilled sales clerks, watchmen and security positions, tobacco outlets provide some bookkeeping and managerial positions. The majority of these positions are filled by tribal members. Tobacco outlets have provided jobs for a number of reservation residents who were unemployed or receiving State public assistance.

Most reservations are located in rural areas and essential goods and services are often provided by the tobacco outlets. Many tobacco outlets sell groceries and gasoline, cash checks, display community notices and job openings and provide an outlet for locally made handicrafts and apparel. It is often the only store on the reservation and frequently the only non-subsidized tribal enterprise.

A very important aspect of tribal tax revenue is its unencumbered nature. For tribes with limited natural resources, tax revenues are often the only unencumbered funds they possess. These funds pay for essentials not budgeted in federal grants and contracts. The tax funds are not subject to burdensome federal reporting and are available without application, approval and a long waiting process. Tribal tobacco taxes often pay for funerals and cultural activities unique to

tribal communities where funding is unavailable for these activities through any conventional funding source.

Many tribes receive federal funds on a cost reimbursable basis through grants and contracts. Tobacco tax revenue will often be used to fund a needed program while the tribe applies for reimbursment. An example is BIA fisheries enforcement funds. While federal funds should be available when the fiscal year begins October 1 and the fishing season is underway, tribes will seldom receive any funds before the following January. Enforcement activities must be carried out and frequently tobacco tax dollars are used to finance these programs in the interim. Tribes would have to borrow funds, which is very difficult, or simply do without many needed programs if tobacco tax revenues were not available.

It should be pointed out that tobacco tax revenue is raised locally and in real dollars is much more effective than federal dollars that must be administered through many layers where often 20 to 30 percent is lost to administration.

The vast majority of funds available to the tribes studied originate from public funds--federal grants and contracts and revenue sharing funds. These funds are usually not predictable and revenue cannot always be anticipated in either amount or timeliness. Professor Russell Barsch states:

> Since tribes are small their public budgeting process tends to be 'lumpy' that is, aggregate expenditures differ greatly from year to year. One year a multi-million dollar community hall is built, then for two years



> no capital additions are made. Larger governmental units such as states are so diversified and manage so many different projects simultaneously that their aggregate revenue needs grow at a fairly even pace.[3]

In contrast to these "lumpy" funds, tribal tobacco taxes provide a steady income that is easy to project from year to year.

Tribal tobacco taxes frequently provide services in areas where the state or county refuse to extend service. Jurisdictional disputes and the isolated location of some reservations have resulted in inadequate state and county law enforcement on most reservations. Tobacco tax money is used by many tribes to fund their law enforcement programs. Officers' salaries, insurance, equipment purchases and funds for operation of tribal courts have been provided by tobacco tax funds. This tax revenue has also funded administrative positions managing tribal law enforcement grants and contracts. Fisheries enforcement by the state does not fulfill treaty mandates. Tribal tobacco tax revenue has been used to fund tribal fisheries patrols, administrative positions in fisheries enforcement and program overhead.

The following text, indexed by tribe, will demonstrate how tobacco sales constitute a large proportion of the tribal economy.

## COEUR D'ALENE INDIAN TRIBE

The Couer d'Alene Tribe, in northern Idaho, operates a tobacco business similar to tribes in Washington State. Under an ordinance adopted by the tribal council in 1972, the Tribe acts as a tobacco distributor doing business with its licensed tobacco outlets and other tribes. The Tribe collects orders for tobacco products from the individual licensed outlets and places the orders with tobacco distributors. These distributors in turn deliver tobacco products directly to the licensed outlets for resale.

Any enrolled tribal member may apply to operate a licensed outlet. Each application is to be accompanied by a $50 application fee and is renewable annually. Applications are approved by the Tribal Council. Applicants who are less than full blooded Coeur d'Alene must obtain a Federal Indian Trader's License in addition to the tribal license.

No sales of tobacco products are allowed to anyone under the age of 18.

Any licensed outlet conducting another business in addition to tobacco sales is required to maintain separate books for the tobacco business.

Any tribe that wishes to utilize the Coeur d'Alene tribal distributorship must have a valid cigarette ordinance as approved by the Bureau of Indian Affairs.



Tribal tobacco taxes are applied to the sale of cigarettes. Currently the tax rate is $.25 per carton. The tobacco tax ordinance authorizes the tax to go as high as $.50 per carton.

All of the cigarette taxes collected by the Tribe have been used to operate a tribal school started in 1974. Cigarette taxes fund approximately one-third of the cost of the operation. The school is oriented to the Coeur d'Alene culture and all of the students and a majority of the teachers are Indian. The principal is also Indian.

Fifty-five Indian children are enrolled in the pre-school program and 88 to 100 are enrolled in kindergarten through 8th grade. The school includes classrooms, gym, swimming pool and recreational fields.

Tribal leaders state that without the contribution of the cigarette tax, the school would be a burden on the Tribe's limited assets.

Presently there are six tobacco outlets operating on the Reservation. Two additional shops were previously operated. There are three employees, all Coeur d'Alene, in the tribal tobacco shop. These three employees also operate a tribally owned service station. The other five outlets are operated as Coeur d'Alene family businesses. Taking into account the fact that the tribally operated outlet employs persons in the service station as well as tobacco sales, there are approximately 15 jobs directly connected with tobacco sales.

In 1978 the Coeur d'Alene Tribe's overall unemployment rate was 49 percent.[2] Of the 252 Coeur d'Alenes in the

potential labor force, 128 were employed. [2]The 15 jobs in tobacco sales represent 12 percent of the total Coeur d'Alenes employed. Of course, in the case of family-run business, the income and jobs are distributed widely and benefit a much larger number of people.

In 1972 one individual was prohibited from acting as a distributor of tobacco products in the name of the Tribe. This action prompted adoption of the first tribal tobacco ordinance.

Coeur d'Alene is unique in the tribes studied in that the State of Idaho recognizes its lack of jurisdiction over tribal cigarette sales. The State is not harrassing the Tribe and tribal officials have a working relationship with the Idaho Tax Commission.

## KALISPEL INDIAN TRIBE

To generate revenue to fund needed tribal programs and services, the Kalispel Tribe adopted a tribal tobacco and liquor code in 1978. The Tribe authorized one tribally licensed shop to begin operations December 15, 1978. The Tribe set the tax rate at 5 percent of the wholesale price and 5 percent of gross sales on all items sold.

From December 15, 1978 to March 15, 1979 the Tribe collected $1,932 in tax revenue from tobacco sales. No liquor has been sold but an application for a federal tax stamp has been made. None of the collected tax revenue has been spent to



date. Some of the tax revenue was uncollected and is being used for capital improvements at the new shop.

The tobacco shop provides a display area for local arts and crafts and for Kalispel Metal Products, a tribal enterprise.

The tobacco shop has created four jobs, all for Indian people. Two of the four employed are Kalispel members and two are Spokane members. The two Kalispels employed represent 8.3 percent of the 24 employed Kalispel members in 1977.[2] (No BIA Labor Force statistics were available for 1978.) One employee of the tobacco shop was formerly receiving State unemployment benefits and another was employed by the CETA program. The Tribe hopes to realize enough income from tobacco and liquor taxes to improve police protection on the Reservation and to provide other services to the tribal community and to the county in general.

## LOWER ELWHA

The Lower Elwha Tribe has operated one tribal tobacco shop since 1974. At present all tobacco sales are made through the tribal shop. The tribal ordinance authorizes individual members to apply for tobacco outlet licenses after the Tribe has become financially stable from the retailing of tobacco products. The tribal tobacco ordinance sets a tax of $.50 per carton for individual licensed sellers and all profit from the tribal shop is collected as tax revenue.

In 1977 profits from tribal tobacco shop sales were $53,880 and in 1978 profits amounted to $57,321. These profits were the only source of unencumbered revenue for the Tribe. Tax revenue was used to fund a Youth Coordinator position for supervision of 29 youths enrolled in a tribal Youth Conservation program. The tax revenue from the tobacco sales was the only source of revenue for this supervisory position. The youths supplied firewood for elders, operated the tribal green house, collected garbage, cut brush along roadways, cleaned spawning streams, and repaired cars for members not able to afford shop work. Tax revenue also funded a part time maintenance position for the Community Center Building. No other funds existed for this position. Travel expenses for Housing Authority members attending training workshops were paid by tobacco tax revenue as were travel expenses for other programs. Senior citizen dinners were supplied by the tax revenue. In addition to these expenditures tax revenue was used extensively in maintaining cash flow for all tribal programs.

The tribal tobacco outlet employs three clerks, all Lower Elwha members. The overall unemployment rate for the Tribe in 1978 was 54.2 percent.[2] The three jobs in tobacco sales represent 3.2 percent of the 92 members employed in 1978.[2]





Under Muckleshoot tribal tobacco and liquor ordinances the Tribe is the only authorized seller of these products. The tobacco shop has been operating since 1972 with the addition of liquor sales in 1978. The Tobacco and Liquor Enterprise is operated as an agency of the Tribal Government. At present, the tribal tax on sales of cigarettes is $.60 per carton and there is a similar excise tax on other tobacco products offered for sale in the amount of 11 percent of the wholesale price. Prior to April, 1978 all net profit of the Enterprise was considered as tax. An excise tax upon each retail sale of liquor, except beer or wine, in the amount of $.03 per fluid ounce is levied by the Tribe. An excise tax upon each retail sale of beer or wine is set at 5 percent of the retail price.

In addition to tobacco products and liquor, the tribal store sells gasoline, snack food, pop, local craft items and clothing. The store provides an outlet for the sale of locally made items and stimulates traditional handicrafts.

No tobacco sales are made to persons under 18 years of age and no liquor sales are made to persons under the age of 21.

By Muckleshoot ordinances, liquor and tobacco taxes shall be used for the benefit of the Reservation and tribal community. In appropriating from these tax revenues, the Tribal Council shall give priority to strengthening tribal government, including

the tribal court system, law enforcement system and the system for administering and enforcing the taxing ordinances. Other priority areas are fire protection, roads, water and sewage systems, health, education, other social services and land acquisition and development needs.

In 1977 the Tribe, under the authority of their tobacco ordinance, closed down an unauthorized tobacco products seller who intended to operate on the Reservation.

In 1977 total gross sales of the tobacco outlet amounted to $1,080,875. Tobacco products accounted for 95 percent, or $1,026,831 of the total gross sales. In 1977, $106,978 was realized in net profit. Under the ordinance in effect at that time, all net profit was tax revenue.

In 1977 the Tribe spent $32,497 in excess of all net profits from that year for a total of $139,475 spent on various governmental and social services. This additional $32,497 was attributable to net profits from tobacco sales in previous years. Of the total spent, $24,906 was used to provide educational services. Tribal educational programs were underfunded for indirect costs. The Tribe spent $14,319 in support of their Johnson-O'Malley Program. This program placed Indian teacher's aides and counselors in public schools used by tribal members and provided books, school supplies and gym clothes. An additional $10,587 was used for administrative support of the Tribe's Title IV Adult Education Program. This program provided tutors and classroom space for Muckleshoot



members seeking GED's.

In 1977 the Tribe spent $11,879 from tribal tax revenue for housing needs on the Reservation. Part of this amount or $8,879 was used to supplement the Bureau of Indian Affairs Housing Improvement Program. Needed repairs for substandard housing far exceeded the money available through this BIA program. Supplies, materials and carpentry tools were purchased. Four Muckleshoot members and one California Indian were employed by this program. An additional $3,000 was spent to supplement salaries of individuals working on a Farmer's Home Administration self-help housing project and a Housing and Urban Development project constructing forty units of low income housing on the Reservation.

Tax revenue of $3,164 was used for space costs, heat, lights, telephone and administration for the tribal health clinic. Between 75 and 125 persons including both Indians and non-Indians are served by the clinic each week. The clinic provides the services of two part-time medical doctors, a full-time licensed practical nurse, a full-time medical assistant, a full-time nurse practioner, a full-time environmental health official, a full-time health planner and two part-time social worker/counselors.

The tribal law enforcement program utilized $10,621 in tax revenue. These monies were used for salaries for enforcement officers, gasoline for patrol cars and boats, and officer's insurance and supplies.

Tax revenue of $21,565 was used to purchase building supplies, fish feed and medication for the tribal fish hatchery. Construction costs of recreational fields used by the Indian and non-Indian community were supplemented by $12,507 in tax revenue. Fifteen Muckleshoot people were employed in the construction project. The Tribal Council utilized $18,277 for travel expenses and registration fees for the nine members to attend regional policy meetings and to testify in Congressional hearings in Washington, D.C. Some of these monies were used to conduct Tribal Council meetings.

Tax revenue of $27,249 was spent for community services. These included senior citizen dinners, garbage collection on the Reservation, purchase of smoke alarms for Indian homes, cultural preservation events such as Skopabsh Days, recreational tournaments, community dances and use of the community center for funeral services. The Tribe spent $9,307 in tax revenue for legal expenses.

In 1978 gross sales from the Tribal Enterprise amounted to $1,283,795. Of this amount 95 percent or $1,219,605 is attributable to tobacco sales. For the months January through March, the tribal tax was the total net profit of the Enterprise. This amounted to $19,341.99. In April, 1978 the Tribe adopted a new taxing ordinance which set a tax rate of $.60 per carton of cigarettes and 11 percent of the wholesale price of other tobacco products sold. Another ordinance placed a tax on items other than tobacco sold in the Enterprise. The total tax collected on tobacco, gasoline, candy, crafts and sundries



was $64,815.89. Tobacco sales accounted for 95 percent of this, or $61,575. The total tax collected on tobacco products in 1978 was $80,916.99.

On October 15, 1978 the Tribal Enterprise began selling liquor. Total taxes collected from liquor sales through January 9, 1979 amounted to $9,573.02.

Tobacco and liquor tax money was combined with other tribal unencumbered income. Expenditures from this fund for tribal programs and costs not covered by federal grants amounted to $263,270 in 1978.

Many programs administered by the Muckleshoot Tribe in 1977 and 1978 were cost reimbursable. Total overhead for government contracts often exceeded the amount provided by the indirect cost rate and was late in arriving. Tobacco and liquor tax revenue was used for interim funding.

The tribal Tobacco and Liquor Enterprise employs ten full-time Indian individuals. This includes a manager, bookkeeper, management trainee, watchman and six full-time clerks. There are three part-time clerks as well as three temporary clerks. Clerks work six-hour shifts. Longer shifts could be implemented but the employment of more persons is desirable in light of a high overall tribal unemployment rate. Employment in tobacco and liquor sales provides a year-round income to families that often depend on seasonal fishing for the bulk of their income.

One of the total sixteen persons employed by the tribal Tobacco and Liquor Enterprise is non-Indian. One Indian

employee is a member of the Puyallup Tribe and the remaining 14 persons are Muckleshoot members. The overall Reservation unemployment rate is 55 percent with a 622-person potential labor force.[2] The 14 Muckleshoot members employed in the Tobacco and Liquor Enterprise represent 5 percent of the total 280 employed Muckleshoots.[2]

Two Enterprise employees were receiving State public assistance prior to being employed in tobacco and liquor sales. At one time CETA funds were used for attendance of a retail clerk training program but now the clerks receive in-house training. Frequently tribal members feel uneasy in a group of non-Indians and are reluctant to seek job training off the Reservation. The tribal Enterprise provides job training for tribal members among their peers. Job training also occurs on the management level. Currently there is one management trainee involved in the Tobacco and Liquor Enterprise.

## PORT GAMBLE BAND OF KLALLAM INDIANS

The Port Gamble Klallam Tribe operates one tribal trading post which sells food, cigarettes and other items. Tobacco sales make up 75 percent of the total sales of the shop.

The Port Gamble Klallam tobacco ordinance adopted in January, 1973 regulates and taxes the sale and distribution of tobacco products on the Reservation. The ordinance limits tobacco sales outlets to the Tribe. The tobacco tax is equal to the net revenue resulting from tobacco sales.



The tobacco enterprise employs five persons, all Port Gamble Klallam members. Two of the five persons employed had been receiving state public assistance benefits prior to their employment in the tribal tobacco shop. According to BIA statistics there were 171 persons in the Port Gamble Klallam potential labor force in 1978.[2] Tobacco sales jobs accounted for 4.8 percent of the total 105 Port Gamble Klallams employed in 1978.[2] The Port Gamble Klallam unemployment rate was 38.8 percent in 1978.[2]

In 1977 tobacco gross sales amounted to $290,250. The net profit collected as tax revenue in 1977 was $51,000. Tribal administrative salaries and miscellaneous accounting services essential to all tribal programs utilized $20,200. A recreational program benefiting 100 community residents, non-Indians as well as Indians, spent $4,700 in tax revenue. A fisheries enhancement program received $700 in tax revenue. The remaining $25,400 was used to maintain cash flow for cost reimbursable federal programs administered by the Tribe. The Port Gamble Klallam tribal controller stated that the Tribe would be unable to operate without the working capital provided by tobacco sales.

In 1978 tobacco gross sales amounted to $261,442 and the Tribe realized tax revenue of $50,000 as the net profit of the tobacco sales. In 1978 administrative salaries benefitting all tribal programs utilized $18,700 in tax revenue. Law enforcement supplies and youth education programs in crime prevention received $1,300. Senior citizen dinners

and activities received $2,500 in tax revenue. The dinners were open to non-Indians as well as Indian persons. The remaining $27,500 was used to alleviate cash flow problems.

## PUYALLUP TRIBE OF INDIANS

The Puyallup Tribe collects the largest sums of tobacco tax of any of the Tribes interviewed. This revenue supports some of the more extensive educational and governmental services.

The Tribe operates a tribal enterprise selling cigarettes, tobacco products, groceries, fish and crafts. This shop employs five to seven clerks in addition to a manager and part-time bookkeeper. These persons are all Puyallup Indians. All the clerks were receiving some type of State public assistance prior to employment by the Tribe.

Through a regulated licensing system, the Tribe authorizes individual tribal members to operate tobacco shops. There are at present 11 tribally authorized shops. One of these shops employs six workers, two of whom were receiving State public assistance before being employed at the shop. The shop's owner estimates that these six workers support 35 family members, including children, through their employment. Eight of the other shops employ five to seven individuals each, and are similar family-run businesses with the proceeds being distributed over a large population. The two remaining shops are larger in size and between them employ thirty persons.



Three Indian tobacco wholesalers also operate on the Reservation. Of the total 92-1/2 jobs created by the tobacco shops, it is estimated that at least one-half of the individuals employed were previously receiving some type of State public assistance. At most, 10 percent of the employed individuals are non-Indians.

According to the 1978 BIA Labor Force statistics, the total potential Puyallup labor force, 16 years of age and over, was 1,865 individuals and of this total,988 are employed.[2] The tribal unemployment rate is 47 percent.[2] After discounting 10 percent for the non-Indians employed by tobacco shops, the 83 Indian jobs represent 8.4 percent of the total Puyallups employed. These are persons directly employed as a result of tobacco sales and many more jobs are made possible by tax and license revenue funding of other tribal programs.

The Puyallup Business Code authorizes tribal police officers to insure compliance with the provisions of the code. In late 1977 and again in April, 1978 the Tribe closed down two unauthorized tobacco sellers until they came into compliance with the Puyallup Business Code.

By ordinance, the Puyallup Tribe imposes a tobacco tax of 5 percent of the licensed outlet's gross proceeds of cigarette and tobacco products. It is the duty of the licensee to collect the tax from the purchasers, keep tax records and make timely tax payments to the Tribe. The tribal shop is taxed at the same rate, but at times pays an additional 5 percent of the gross proceeds of cigarette and tobacco products

for administration of the tribal accounting records. In addition to the tax, a $500 annual license fee is collected by the Tribe for each licensed outlet.

In 1977 tobacco taxes and license fees collected for three months amounted to $154,000. These monies were spent for a variety of services and programs. Tax revenue of $39,000 was used for start-up costs for a tribal fish cannery which employs 30 Indians and Japanese workers. Tax revenue of $5,700 was spent supporting the tribal fish propagation program and $21,000 in tax revenue was appropriated for the tribal law enforcement program. This program supplements State and local law enforcement not adequately delivered to Reservation residents. This tribal program also includes fisheries enforcement.

Administrative salaries amounted to $9,500 supporting programs such as education, housing rehabilitation, senior citizen activities and health and child welfare programs. Tax revenue of $78,800 was not spent that year, but was used to alleviate cash flow problems resulting from the operation of cost reimbursable federal programs. A fisheries management program funded by the BIA which should have begun operation at the beginning of the federal fiscal year, October 1, would have been delayed until the following January if unencumbered tribal funds were not available to fund the program in the interim.

In 1978 tobacco taxes collected for the 12 months totalled $549,000. Administrative salaries supporting a variety of tribal programs appropriated $210,000 in tax and license revenue.



The tribal law enforcement program received $70,800. The fisheries program received $61,000. The tribal construction program was supplemented with $51,000 in tax revenue. Seriously needed administrative and clinic space was constructed employing 12 Puyallups.

Tax revenue of $48,000 provided partial funding for the Puyallup Tribal School District with its Indian cultural program. There are three schools in the District with 270 to 275 currently enrolled students in Head Start through the 12th grade. There is a 50-person waiting list for the high school and 60 persons are waiting for the pre-school program. Tax and license monies have also been used for interim funding where federal education money is late in arriving. The success of the tribal education program may be attributed in part to the program's orientation to tribal culture and heritage, an educational aspect lacking in State public schools.

Tribal members and employees may receive scholarship money to continue their education from the education funds. At present the tax revenue is providing the means for a tribal school principal to continue his education. Transportation for Puyallup Group Home residents was also provided under the tax and license fee money spent on the Puyallup education program.

Tribal Enterprises used $30,000 in tax and license revenue for economic development projects in 1978. Tax revenue

of $32,500 was used to supplement tribal legal expenses and $12,000 was used for support of the legal program.

All programs use equipment and frequently federal programs restrict equipment purchases. Copying, secretarial and audiovisual equipment and office furniture were purchased with $19,000 in tax and license revenue.

The Youth Conservation Project used $7,000 for the supervision of 30 youths. This federal program does not include money for the supervision required in management of a successful program. Some of the work done by the youths included rehabilitation and clean-up of local fish spawning streams. Tax revenue of $6,000 was used in a land study and $1,700 went toward utility bills for all tribal programs.

## QUILEUTE INDIAN TRIBE

The regulation and taxing of tobacco sales on the Quileute Indian Reservation is included in the Quileute Business Licensing and Taxing Ordinance. This comprehensive ordinance imposes a Business and Occupation tax on all Reservation businesses. The ordinance has a schedule of licensing fees for the operation of businesses such as motels, trailer parks, charter boats, general stores, and tackle shops. In addition to license fees, taxes on the sale of gasoline, fish, tobacco and gross sales of any other businesses are imposed by the ordinance. Tax credits are given to encourage Indian employment.

The Tribe received $143,528.57 through B&O taxes in 1978. This made up over one-third of the total tribal budget.



The B&O taxes collected at $.50 per carton and 10 percent of the gross sales of other tobacco products from non-tribal tobacco sellers amounted to only $25.00 in 1978. Because these non-tribal tobacco sellers include the Washington State Tobacco Tax of $1.60 per carton in the retail price as well as the tribal tobacco tax, sales are minimal. Because of the double taxation, tobacco products are purchased almost exclusively at the tribal tobacco shop.

The Quileute Tribe operates one tobacco shop on the Reservation. The tax revenues generated from the tribal tobacco shop are retained in the enterprise for its operation. At the close of the year the net profits, if needed by Tribal Government, are transferred into the General Fund of the Tribe.

In 1977 the tribal tobacco outlet had a net profit of $1,064.15 on gross sales of approximately $57,000. This profit was transferred to the Tribe for use in salaries for accounting, secretarial work and tribal supervision.

In 1978 the tribal tobacco outlet had gross sales of $50,919.19 and a net loss of $1,[illegible]9.22. If profits had been shown in this period they would also have been transferred to the Tribe's General Fund. Transfers of net profits from the tribal tobacco outlet have been insignificnt in comparison to the tax revenue generated from other businesses on the Reservation paying B&O taxes.

In 1978 a non-Indian store made some incidental cigarette sales without paying the tribal tobacco tax. When informed

that they were liable for tribal taxes, they agreed to discontinue tobacco sales entirely.

Sale of tobacco products by the Tribe provides two jobs for Quileute members. No other items except tobacco products are sold at the shop. According to BIA Labor Force statistics, the Tribe had an unemployment rate of 74 percent in 1978 with a potential labor force of 193 persons.[2] The two tribal members employed in tobacco sales represent 4 percent of the total 50 tribal members employed. [2]

The total revenues generated by business license fees and taxes provide essential governmental services to the Indian and non-Indian community on the Reservation. Tribal services include police and fire protection (nearest State Police station is over 20 miles away), day care, Head Start, school lunches, senior citizen programs, adult education and water, sewer and garbage service.

## QUINAULT INDIAN NATION

The Quinault Tobacco Control Act of 1978 establishes the Quinault Tobacco and Trading Company as the exclusive tobacco outlet on the Reservation. The Tobacco Control Act imposes a tax on the sale of cigarettes in the amount of $.50 per carton and can be set as high as $1.00 per carton. Other tobacco products are taxed at the rate of 10 percent of the retail price.

The revenue collected will be spent to provide for the health, education and welfare of the Reservation residents.



Priorities for spending are to strengthen tribal government, health, education and other social services, fire protection, roads, ambulance and rescue service, water and sewage services, land acquisition, development needs and environmental protection.

In addition to taxing, the Quinault ordinance prohibits sales to anyone under 18 years of age, provides for penalties including seizure and forfeiture for violations and outlines the general framework under which the tribal tobacco business shall operate.

The ordinance designates the Tribe as the only authorized Indian tobacco outlet on the Reservation. The Tribal Court has ordered one person to cease sales of tobacco products. This case is currently being appealed to the Tribal Court of Appeals. At present no sales of untaxed tobacco are being made by this individual. The only other unauthorized retail operator is scheduled for trial in early May, 1979.

The tribal tobacco enterprise has been operating since December, 1978. Since beginning operations through April, 1979, the total tobacco tax revenue collected by the Quinault Nation was $3,789.49. The tax is collected monthly on the basis of purchases made from the wholesaler. The tax is then passed on to the ultimate consumer by its addition to the retail price.

Because of the recent commencement of tobacco sales, no appropriations from the tax revenue have been made. Under the priority scheme outlined above, the tax revenue is to

be spent to provide health, education and welfare services. One service to be funded by tobacco tax revenue is the Reservation-based ambulance. The Reservation is located at least one hour each way from the closest hospital and a Reservation-based ambulance means persons can be transported to the hospital in one hour instead of the two hours required if an ambulance based close to the hospital is used. A second highly needed service is police protection. Most of the Reservation is not policed by the State against theft of forest products.

The tribal tobacco shop operates within the general store owned and operated by the Quinault Nation. The general store sells a variety of grocery items, fresh and canned fish and gasoline. Six persons are employed in the general store. One of these jobs is made possible by tobacco sales. The person employed is a Quinault Indian.

The Quinault Nation had an overall unemployment rate of 29.3 percent in 1978 with a potential labor force of 731 persons.[2] The one Quinault employed in the tobacco sales represents 0.1 percent of the 517 employed Quinaults.[2]

The Quinault Nation anticipates opening two additional outlets for tobacco products and groceries which will result in eight additional jobs for tribal members.

## SHOALWATER BAY INDIAN TRIBE

The Shoalwater Bay Indian Tribe is located on a small reservation in southwest Washington with the smallest tribal



population of those tribes studied. The Tribe has had a tobacco ordinance in effect since April, 1975 and at present a new ordinance has been drafted but has not yet been adopted.

Under the present ordinance each licensed seller must submit to the Tribe an annual license fee of $25.00 and 1 percent of the gross income of the business as tax. In addition to the tribal license the new ordinance requires the seller to obtain a Federal Indian Trader's License. The tax rate under the new ordinance is more than double that under the present ordinance. The new tax rate is $.10 per carton.

The Shoalwater Bay Tribe has licensed two tribal members to operate tobacco outlets. These two shops sell items other than tobacco but tobacco sales amount to 95 percent of the business. Total sales in 1977 from these two shops totalled $528,119 with a tax paid of $5,281.19. Ninety-five (95) percent of these sales, or $501,713.05, and 95 percent of the tax, or $5,017.13, was the result of tobacco sales.

The tax is collected quarterly and one-half of the tax goes to the Tribal Education Foundation and one-half to the tribal general fund. The Education Foundation distributes tax funds to needy members in the form of scholarships. Five to seven persons are currently receiving benefits.

The tribal general fund purchases equipment and supplements areas where grants and contracts for tribal programs are insufficient. Areas where expenditures were made are the

Summer Youth Program, community health workers, tribal police force and cultural and language preservation. The tribal general fund is also used to support programs while awaiting reimbursement from the federal government.

In 1978 taxes of $4,711.03 were collected on sales of $471,103. Ninety-five (95) percent of these sales or $447,547.85 and 95 percent of the tax, $4,475.48, was realized by the sale of tobacco products. Again, one-half of the tax revenue was used by the tribal Education Foundation. The remaining one-half of the tax revenue was used for the same purposes as in 1977, and in addition $300 was spent for oyster seeds for the tribal aquaculture project and $300 was spent for fish feed, lumber and screens for the tribal fish hatchery. Tax revenue of $200 was used for funeral expenses .

In the two shops, six persons are employed. Two of these are non-Indians. BIA Labor Force statistics state that the tribal unemployment rate in 1978 was 55.1 percent.[2] The potential labor force was 27 individuals in that year and 19 of these were employed.[2] The four Shoalwater Bay Indians employed in tobacco shops represent 21 percent of the total 19 Shoalwater Indians employed. One of the persons persons employed in the shops was previously receiving State public assistance.



## SKOKOMISH INDIAN TRIBE

The Skokomish Tribe operates a tribally owned tobacco enterprise selling tobacco products as well as locally made crafts. There are two licensed tobacco outlets on the Reservation owned and operated by Skokomish members. One of these outlets has just opened within the month of April. The other outlet has been in operation since 1977 in violation of the tribal ordinance limiting sales to a tribal enterprise. In 1978 the Tribe attempted to halt sales from this outlet in tribal court but the case was dismissed on a technicality. A second prosecution prompted a local referendum that resulted in an emergency interim ordinance permitting individual members to operate licensed tobacco outlets.

A tribal tobacco outlet license fee of $150 for a six-month period is now required in addition to a Federal Indian Trader's License. Under the emergency interim tobacco ordinance adopted in April, 1979, the tobacco tax imposed is $.325 per carton of cigarettes and 5 percent of the wholesale price of all other tobacco products. All tobacco tax revenues are deposited in the Tobacco Tax Fund to be used for enforcement and administration of the ordinance, educational, recreational and cultural activities, planning and administration of economic development of the Reservation community, land use planning, administration of land use controls, natural resource management and conservation, water, sewer, solid waste disposal, fire protection, police, administration

of justice, development and protection of archeological resources and tribal program administration services.

In 1977 the tribal tobacco shop had gross sales of $395,195.90 and of this amount, 95 percent, or $355,676, was attributable to tobacco sales. The ordinance in effect in 1977 allocated all the net profit from the enterprise as tax revenue to be deposited in the Tribal General Fund. The tribal tobacco shop's net profit of $94,123.80 accounted for 78 percent of the total amount expended from the general fund in 1977. These general funds were used for a variety of governmental services, including an expenditure of $46,010.12 to employ a tribal manager, a tribal controller, a program director, a maintenance person and to supplement salaries of a secretary and part-time bookkeeper.

These administrative positions manage all tribal programs including supervision of the CETA staff, a learning center serving 30-40 students in educational and cultural activities and an Indian language program serving 60-70 persons. Other programs administered include a tribal housing rehabilitation project in which six tribal employees will weatherize and rehabilitate 40 substandard homes on the Reservation, and programs for fisheries management, enhancement and enforcement. Two hatcheries are maintained by the Tribe on the Reservation.

Employment of the entire administrative staff with tribal funds is a goal of Skokomish tribal officials. This would permit employment of the best individual for a job whether or not that individual can meet the requirements set for



a federally funded tribal position. At present the Tribe has two job openings for accountants and qualified persons have applied, but no qualified person has been out of work for ten weeks, a CETA requirement for employment. In addition, the maximum CETA salary is only $833 per month and this precludes many qualified individuals from accepting these positions.

In addition to the administrative salaries, $18,664 in general funds were used to provide technical assistance to the Tribe in 1977. An expenditure of $12,105 was made to insure tribal buildings, vehicles, boats and equipment, and $7,191 was used for tribal land purchases. The general fund supplied $6,513 for telephone service and $5,715 for utilities. Building and grounds maintenance received $3,830. Funeral expenses accounted for $296 and $293 was used for the tribal recreation program. The remaining $19,384.60 was used for travel expenses, office equipment purchase and maintenance, office supplies and duplication. A total of $120,294.72 was spent from the tribal general fund that year.

In 1978 revenue from the tribal shop was considerably less than the previous year. This was the direct result of the opening of a tobacco shop by a tribal member in violation of the ordinance in effect at that time.

In 1978 the tribal shop had gross sales of $196,550.56 and 95 percent of this, or $186,722, was attributable to tobacco products. This resulted in net income or tax revenue of $16,454.46. Tribal tobacco shop income made up 17 percent

of the total $96,801.30 expended from the general fund in 1978. Administrative salaries accounted for $50,955 in 1978 general fund expenditures and $10,967 was used for insurance. An expenditure of $7,679 was made for telephone, $3,006 was used for utilities, $3,105 for duplication costs and $2,400 for technical assistance to the Tribe. The tribal recreation program utilized $523 and the remaining $18,166.30 was used for travel expenses, equipment purchase and maintenance, building and grounds maintenance and office supplies.

The tobacco tax revenue through its deposit in the general fund was used to maintain cash flow for all tribal programs. The goal of the Tribe is to become self-sufficient through economic development with all salaries paid through tribal income. Future uses of tax revenue include development of fire protection, ambulance service and improved law enforcement. At present these services are insufficiently provided by the county to the Reservation community.

The tribal tobacco outlet employs four tribal members and one Yakima Indian. The two individual licensed outlets employ five persons each. The 14 Skokomish Indians employed in the tobacco shops represent 10.7 percent of the total 130 members employed in 1978.[2] Reservation employment was 29 percent in 1978 with a potential labor force of 183, according to BIA Labor Force statistics.[2]



## SQUAXIN ISLAND INDIAN TRIBE

The Squaxin Island Tribe has been selling tobacco products since 1977. The tobacco outlet is tribally owned and operated. No other tobacco outlets are authorized. In addition to tobacco, the tribal shop sells other items, including groceries, seafood and handicrafts. An estimated 90 percent of sales result from tobacco products. The Tribe has been operating according to an ordinance never officially adopted and is presently considering a new cigarette taxing ordinance. The tribal tax has been and will continue to be 4 percent of all gross receipts.

In 1977 the tribal shop had gross sales of $654,986.50, of which 90 percent, or $589,487.85, was realized from the sale of tobacco products. A 4 percent tribal tax imposed on all gross receipts resulted in tax revenue of $26,199.46 with $23,579.51, or 90 percent, attributable to the sale of tobacco products. In addition the tribal shop had a net profit of $70,607.36 for a total of $96,806.82 available to the Tribe in tax revenue and net profit.

In 1977 the $96,806.82 in revenue was used in four areas. First, $12,546.54 was used for administrative salaries and operating costs attributable to all tribal programs. Some of the programs provided by the Tribe were health, education, fisheries enhancement, law enforcement, housing and housing repairs, recreation, and senior citizens and

youth programs. Tax revenue of $15,630.81 was spent in a tribal land clearing program. A payment of $31,839.53 was made to obtain a Housing and Urban development housing site. Tax revenue of $36,789.94 was used to maintain cash flow by meeting payrolls and expenses for federal programs where monies had not yet been received.

In 1978 the tribal outlet had gross sales of $739,336 of which 90 percent, or $665,303.40, resulted from tobacco sales. The 4 percent tax on all gross receipts netted $29,569.04, of which 90 percent, or $26,612.13, is attributable to tobacco sales. In addition, the tribal shop realized a net profit of $86,334.60 in its operation in 1978. Total revenue of $115,903.64 was available to the Tribe in taxes and net profit from the shop.

In 1978 the total revenue of $115,903.64 was used in four areas. Administrative salaries supporing 11 persons and for operating costs serving all tribal programs accounted for $51,342.65. These programs were identical to those supported in 1977. Tax revenue of $48,852.04 was spent for indirect costs. This money may be recovered from the federal government under an indirect cost rate now being negotiated for government contracts. Light bills, heat, telephone and other supportive services are immediately necessary and unencumbered funds must be utilized for prompt payment. The Tribal Council made available $23,314.76 as loans to tribal fishermen. Of this amount, $9,986.74 was



repaid in 1978, leaving a balance outstanding of $13,328.02. Tribal fishermen ordinarily receive loans through the Bureau of Indian Affairs and the Indian Finance Act; however, these loans were not made available by the federal government in 1978. Tax revenue of $2,380.93 was used in 1978 by the Tribe to support cash flow for all tribal payrolls and programs.

At the tribal tobacco shop, seven persons are employed; six of these are Squaxin Island Indians. Two of the workers were receiving State public assistance before being employed in the shop. In addition, the tobacco tax and net profits fund positions for 11 tribal administrative persons, of which two are non-Indian. According to BIA Labor Force statistics, in 1978 the Squaxin Island Tribe had an overall unemployment rate of 37.6 percent and the potential labor force 16 years of age and over was 261.[2] The six Squaxin Island members employed by the tobacco shop represent 3.7 percent of the total 163 members employed.[2]

The Reservation attorney reports that fisheries enhancement and patrol, as well as law enforcement, especially policing trespassers on the uninhabited Squaxin Island, and patrol of tribal housing is insufficiently provided by the State. State social and health services, although available to members, are offered at inconvenient locations and transportation from a rural reservation to the point of service delivery is often impossible for many tribal members. The State is reluctant to provide services at

more convenient locations because the number of tribal members is too small to justify the expense of bringing services to them. Areas of difficulty include day care, Head Start, medical and dental services, counseling for alcohol and drug abuse prevention, adult education, juvenile and foster care and recreation.

The Tribe provides limited services that are frequently available through the State in more populated areas. Although severely limited by tribal resources, some of these services include employment counseling, training and career placement, parent effectiveness training, senior citizen lunches, legal services, temporary emergency housing, summer youth programs, health maintenance and education, nutrition information, fisheries patrol and enhancement. In addition, the Tribe serves as liaison to the Indian Health Service.

## SUQUAMISH INDIAN TRIBE

The Suquamish Tribe, located on the Kitsap Peninsula, first adopted a tobacco ordinance in 1972. In 1977 the Tribe operated two tobacco shops while licensing two individually owned shops. Individual shops must be owned by tribal members and are required to obtain a Federal Indian Trader's License in addition to a tribal license. In 1978 the Tribe operated one tribal shop and licensed two individual shops. At present one tribal and one licensed individual shop are in operation.



Pursuant to the tribal tobacco ordinance one individual seller who refused to pay the tribal tax was closed down by the Tribe in 1972.

Presently the tribal tobacco excise tax is $.50 per carton and 8 percent of the wholesale price of other tobacco products. Under a prior ordinance the tribal tobacco tax was $.20 per carton. Prior to October, 1977, the tribal tobacco tax was considered to be the net profit from the enterprise. In addition to net profits the tribal shop is now taxed at $.50 per carton of cigarettes and 8 percent of wholesale price of other tobacco products as specified in the ordinance. Tobacco sales are prohibited to anyone under 18 years of age.

In 1977 sales from the two tribal shops totalled $265,947 and 90 percent of this amount, or $239,352, was realized by the sale of tobacco products. Net income or tax revenue in 1977 from the two tribal shops then in operation was $22,408. In 1977 the individual licenses sellers contributed $64,249 in tax revenue. This brought the total tax revenue collected by the Tribe to $86,657 for 1977.

In 1977 $22,408, or the net income from the tribal shops, was used for administrative salaries and operating costs for all tribal programs; these programs included fish enhancement, enforcement and management, tribal police, tribal court, cultural preservation, recreation, summer school and preschool. Dollars spent for operating costs

covered expenses such as health insurance, office supplies, office equipment and legal fees. Tax revenue of $14,992 was used to purchase land in the name of the Tribe and $15,552 was spent in construction of a new tribal tobacco shop. The remaining $33,705 was used for Housing and Urban Development matching funds and was utilized in supporting the tribal cash flow for all tribal programs.

In 1978 the one tribal shop in operation realized a net profit of $10,055.82 from gross sales of $545,123.90. The tribal shop transferred $8,420.48 of its net profits to the Tribe and retained the remainder for improvements. This store realizes 90 percent of its sales from tobacco products. An additional $62,515.75 in tobacco tax was paid the Tribe from the tribal tobacco enterprise. In 1978 the two individual licensed shops contributed $72,747 in tax revenue to the Tribe. Total tax revenue collected in 1978 was $143,683.23.

In 1978 the tax revenue was again utilized for administrative salaries in support of all tribal programs and for tribal operating costs not covered by governmental grants and contracts. Programs in 1978 included three community health workers whose transportation needs were met by tobacco tax revenue, a cultural program including a museum, old photo collection, archives and oral history tape collection, two fish hatcheries, and a tribal court. The tax revenue also supported the administrative overhead of a community



development director. Support of cash flow was even more important in 1978. Freda Scott, tribal accountant, stated, "Tribal operations would probably be reduced to a minimum if cigarette sales stopped."

In 1978 the three tobacco shops in operation employed 16 Indian people. One of the employees in the tribal shop was receiving State unemployment benefits prior to being employed in the shop. The overall tribal unemployment rate in 1978 was 56.1 percent, according to BIA statistics.[2] With a total potential labor force of 132, the tobacco shop's sixteen employees represent 27 percent of the total 58 Suquamish employed.[2]

## SWINOMISH INDIAN TRIBE

The Swinomish Tribe licenses two individual tobacco outlets. Sales have been taking place since 1972. Any enrolled tribal member may apply for a tobacco outlet license with payment of a $100 yearly license fee and acquisition of a Federal Indian Trider's License. All tobacco products shall be purchased from the Tribe unless the licensed outlet becomes an agent of the Tribe. All tobacco products remain property of the Tribe until sold to the ultimate consumer. The Tribe prohibits sales to persons under 18 years of age.

In 1977 the tribal tobacco tax was $.10 per carton. In November, 1978, an amended ordinance was approved, raising the tax to 5.5 percent of gross sales of all tobacco products.

In 1977 the Tribe collected tobacco taxes from its licensed outlets in the amount of $48,000 on gross sales of $873,000. Administrative salaries of $19,000 were paid with tax revenue in 1977. One administrator, salaried with tax revenues, was responsible for all tribal programs and a Reservation employment counselor received on-half of his salary from this source. The employment counselor works with all unemployed tribal members seeking jobs and develops training programs to improve employment skills. Resume writing and interview techniques are taught and job placement services are performed. The Tribe has found that this Indian counselor meets the needs of unemployed Indians better than State agency counselors.

Also in 1977, $7,680 was utilized for fisheries enhancement. These funds purchased fish food, screens, nets, fish medication and other necessary supplies for hatchery production. In 1977 $4,800 was used to support the tribal recreation program serving 50 Indian and 50 non-Indian people. These funds made possible upkeep on the gym facilities, purchase of equipment and transportation to regional tournaments. The tribal law enforcement program used $13,920 for upkeep on patrol cars, purchase of gasoline, radio equipment, uniforms and insurance for the officers. The Tribe spent $2,600 for general administrative support. This included office supplies and utilities attributable to all tribal programs.

In November, 1978, an amended tobacco ordinance was adopted. This raised the tobacco tax rate to 5.5 percent



of the retail sales price. The new ordinance more than doubled the tribal tax rate and instituted a similar tax on other tobacco products. Tax revenue of $56,000 was collected in 1978 with its increased tax rate in effect for only two months. In 1978, gross sales for the two licensed tobacco shops was $1,018,000 in tobacco products.

In 1978, $22,000 in tax revenue was spent for administrative salaries, for a position overseeing all tribal programs and funding one half of the employment counselor's position. Tax revenue of $8,960 was spent in the tribal fish enhancement program and $5,600 was spent for a tribal recreation program serving Indians and non-Indians. Tax revenue of $16,240 was spent in the tribal law enforcement program and $3,200 was used in general administrative support for all tribal programs.

With the increased tribal taxes in effect for a full twelve months in 1979, tribal officials estimate the tobacco taxes collected will be $82,000 and will be used in the same areas.

Tribal administrator Terry Beniman states, "Without revenue from cigarette taxes, we could not accept many grants and contracts. Miscellaneous costs and costs not included in grants and contracts must be picked up by the cigarette tax revenue." An example is the EDA Local Public Works project that has funded construction of a community center for the Tribe. The grant funds will not pay for furniture,

kitchen appliances, telephones and office equipment. Purchase and installation of these items is very expensive.

The two tribally licenses tobacco shops employ five persons plus two owner-operators. Two of these seven persons are non-Indians. According to Bureau of Indian Affairs Labor Force Reports in 1978 the overall tribal unemployment rate was 48.1 percent with a total potential labor force of 270.[2] The five Swinomish employed in the tobacco shops represent 3.5 percent of the total 140 Swinomish employed.[2]

Swinomish Social Service Director, Ed Senner, reports that there are many areas in which the State insufficiently supplies services to the Reservation community. Due to the lack of communication between the Department of Social and Health Services and Reservation residents, only an estimated one-half of eligible Swinomish residents receive Food Stamps. No public transportation is available because the county-wide bus system does not offer service on the Reservation. No extension courses are available on the Reservation through the neighboring Skagit Valley College. There is a gross lack of State and county law enforcement services on the Reservation including State Patrol and County Sheriff, adult probation and enforcement of fishing regulations. Road maintenance by the county and State has been inadequate. The county health nurse serving the Reservation has been replaced by a nurse supplied by the Indian Health Service and the Women and Infant Care Program has been taken over by the Tribe to improve services.



The State does not provide any counselling services for alcoholics on the Reservation, nor do they have an Indian on the State staff to deal with Indian alcoholics. Lack of public transportation further hampers the Indian alcoholic in seeking State counselling services. The Swinomish Indian Tribal Community has one alcoholism counselor paid by the Indian Health Service to provide services under the Swinomish Alcoholism Prevention and Control Program.

## FOOTNOTES

1. Coeur d'Alene, Kalispel, Lower Elwha, Muckleshoot, Port Gamble, Puyallup, Quileute, Quinault, Shoalwater Bay, Skokomish, Squaxin Island, Suquamish and Swinomish.

2. Bureau of Indian Affairs Labor Force Reports, 1977, 1978.

3. R. Barsch, article to appear in Washington Law Review, June, 1979, p.81.